CONSTITUTIONAL CONVENTIONS IN SOUTH AFRICA: A REAPPRAISAL

by

DONALD JOHN LEYSHON

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Supervisor:

Dr W H B Dean

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A.M.D.G

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ABBREVIATIONS

LAWSA	:	Law of South Africa
LQR	:	Law Quarterly Review
MLR	:	Modern Law Review
SALJ	:	South African Law Journal
THR-HR	:	Tydskrif vir Hedendaagse Romeins-Hollandse Reg

FOOTNOTE CROSS-REFERENCES

ch 'x' op cit 'y'	:	This is a reference to page 'y' in Chapter 'x' of the thesis.
ch 'x' op cit 'y' and n5	:	This is a reference to page 'y' and to footnote 5 in chapter 'x' of the thesis.

BIBLIOGRAPHY

Basson, D.A., Verteenwoordiging in die Staatsreg, (unpublished LLD thesis. UNISA) (1981).

Basson, D.A., and Viljoen, H.P., Suid-Afrikaanse Staatsreg, 1ed (1987)

Booysen, H., and Van Wyk, D., Die '83 Grondwet, (1984)

Boulle, L.J., South Africa and the Consociational Option - a constitutional analysis, (unpublished Phd thesis. University of Natal) (1982).

Cape Times., 25th October 1915

Cape Times., 27th October 1915

Cape Times., 6th November 1928

Cape Times., 7th November 1928

Cape Times., 12th February 1985

Coertze, L.I., 'Die Posisie Van Die Koning As Hoof Van Die Uitvoerende Gesag Van Die Unie van Suid-Afrika', (1939) 3 THR-HR

Coertze, L.I., 'Die Wetgewende Orgaan Van Die Unie van Suid-Afrika', (1941) 5 THR-HR

Crafford, F.S., Jan Smuts - a biography, (1945)

Dean, W.H.B., 'A New Constitution for South Africa?' (1984) Jahrbuch Des Öffentlichen Rechts Der Gegenwart

Dean, W.H.B., 'Control by Cabal', (1986) 5 (No 4) Leadership

De Smith, S.A., Constitutional and Administrative Law, 4ed (1981)

De Smith, S.A., The New Commonwealth and its Constitutions, (1964)

Dicey, A.V., An Introduction to the Study of the Law of the Constitution, by E.C.S. Wade (ed) 10ed (1959)

Drewry, G., 'The Ponting Case - Leaking in the Public Interest,' (1985) Public Law

Dugard, J., Human Rights and the South African Legal Order, (1978)

Earl Buxton., General Botha, (1924)

Erskine May's Treatise on the Law, Privileges, Proceedings and Usages of Parliament, by Sir C. Gordon (ed) 20ed (1983)

Erskine May's Parliamentary Practice, by Sir Barnett Cocks (ed) 18ed (1971)

Evatt, H.V., The King and His Dominion Governors, (1936)

Geldenhuys, D., and Kotzé, H., 'Man of Action', (1985) 4 (No 2) Leadership

Gilomee, H., The Rise and Crisis of Afrikaner Power, by H. Gilomee and H. Adam (ed) (1979)

Gilomee, H., The Parting of the Ways : South African Politics 1976-1982, (1982)

Gilomee, H., 'Adopted Strategies for the maintenance of White rule', Conference on Economic Development and Racial Domination. (University of the Western Cape) Paper No 36 (October 1984).

Goldblatt, R.E., (1975) 5 LAWSA

Hahlo, H.R., and Kahn, E., The Union of South Africa - the development of its Laws and Constitution, (1960)
Hansard., House of Assembly Debates, 103 (1960)
Hansard., House of Assembly Debates, 72 (1978)
Hansard., House of Assembly Debates, 78 (1978)
Hart, H.L.A., The Concept of Law (1961)
Hood Phillips, O., Constitutional and Administrative Law 6ed (1978)

Jennings, Sir I.W., Cabinet Government, 3ed (1959)
Jennings, Sir I.W., The Law and the Constitution, 5ed (1959)
Johnson, N., In Search of the Constitution : reflections on State and Society in Britain, (1977)

Kahn, E., (1961) Annual Survey of South African Law
Kahn, E., The New Constitution, (1961)
Keith, A.B., Responsible Government in the Dominions, 111 (1912)
Keith, A.B., Dominion Home Rule in Practice, (1921)
Keith, A.B., The Constitution, Administration and Laws of the Empire, (1924)
Keith, A.B., Constitutional History of the First British Empire, (1930)
Keith, A.B., The Constitutional Law of the British Dominions, (1933)
Keith, A.B., The Dominions as Sovereign States, (1938)
Keith, A.B., 'The War and the Constitution', (1940-41) MLR
Kennedy, W.P.M., and Schlosberg, H.J., The Law and Custom of the South African Constitution, (1935)
Krüger, D.W., The Age of the Generals, (1958)
Krüger, D.W., South African Parties and Policies 1910-1960, (1960)
Krüger, D.W., The Making of Nation, (1969)

Le May, G.H.L., 'Parliament, The Constitution and the Doctrine of the Mandate', (1957) 74 SALJ

MacIntosh, J.P., The British Cabinet, (1977)
Maitland, F.W., The Constitutional History of England, (1931)
Malan, F.S., The Cambridge History of the British Empire, by E.A. Walker (ed) VIII South Africa, Rhodesia, and the High Commission Territories 2ed (1963)
Maley, W., 'Laws and Conventions Revisited', (1985) 48 MLR
Mandelbrote, H.J., The Cambridge History of the British Empire, by E.A. Walker (ed), VIII South Africa, Rhodesia, and the High Commission Territories 2ed (1963)
Munro, C.R., 'Laws and Conventions Distinguished', (1975) 91 LQR
Munro, C.R., 'Dicey on Constitutional Conventions', (1985) Public Law
Markesinis, B.S., The Theory and Practice of Dissolution of Parliament, (1972)
Marshall, G., Constitutional Conventions : The Rules and Forms of Political Accountability, (1984)
May, H.J., The South African Constitution, 3ed (1955)

Olivier, G.C., The Government and Politics of South Africa, by C. De Crespigny and R.A. Schire (eds) (1978)

Parliamentary Register 1910-1961, (1961)
Parliamentary Register 1910-1982, (1982)

Report of the Commission of Inquiry into matters relating to the Coloured Population Group, RP 38/1976
Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information RP113/1978
RGN-sportondersoek. Statutêre bepalings wat sport beïnvloed (deel 1). Verslag van die Werkkommittee : sportwetgewing (No 3) (1982) 60-61
Rotberg, R.I., 'The Process of Decision-making in Contemporary South Africa', (1983) No 22 Africa Notes (The Georgetown University Center for Strategic and International Studies)
Roux, B., South Africa : Government and Politics, by D. Worrall (ed) 2ed (1975)

Sampford, C., and Wood, D., 'Codification of Constitutional Conventions in Australia,' (1987) Public Law
Schire, R.A., The Government and Politics of South Africa, by C. De Crespigny and R.A. Schire (eds) (1978)
Schmidt, C.W.H., 'Die Grondwet van die Republiek van Suid-Afrika, Wet No 32 of 1961', (1962-'63) 25-26 THR-HR
Second Report of the Select Committee on the Constitution (on the Republic of South Africa Constitution Bill), (SC 8B-'83) Part I
Selections from the Smuts Papers, by J. Van Der Poel (ed) V (1973)
Steyn, L.C., Die Uitleg Van Wette, by S.I.E. Tonder (ed) 4ed (1974)
Supplementary Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information, RP63/1979
Swift MacNeil, J.G., The Constitutional and Parliamentary History of Ireland Till Union, (1917)
The Report of the Inter-Imperial Relations Committee of 1926 (Cmd 2768)
The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929 (Cmd 3479)
The Report of the Imperial Conference, 1930 (Cmd 3717)
The Second Report of the Constitutional Committee of the President's Council, PC 4/1982
The Times, 'Jury Aquits Ponting of secrets Act breach', 12th February 1985

Van Den Heever, C.M., General J.B.M. Hertzog, (1946)
Van Der Vyver, J.D., 'Parliamentary Sovereignty, Fundamental Freedoms and A Bill of Rights', (1982) 99 SALJ
VerLoren Van Themaat, H., 'Konvensie En Reg', (1942) 6 THR-HR
VerLoren Van Themaat, J.P., Staatsreg, 1ed (1958)
VerLoren Van Themaat, J.P., Staatsreg, by M. Wiechers (ed)

2ed (1967)
VerLoren Van Themaat, J.P., Staatsreg, by M. Wiechers (ed) 3ed (1981)
Vorster, M.P., 'n Nuwe Grondwetlike Bedeling Vir Suid-Afrika, by S.C. Jacobs (ed) (1981)

Wade, E.C.S., and Bradley, A.W., Constitutional and Administrative Law, by A.W. Bradley (ed) 10ed (1985)
Wade, E.C.S., and Godfrey Phillips, G., Constitutional and Administrative Law, 9ed (1977)
Walker, D.M., The Oxford Companion to Law, (1980)
Welsh, R.S., 'Martial Law', (1941) 58 SALJ
Wheare, K.C., The Statute of Westminster and Dominion Status, 5ed (1953)
Wheare, K.C., The Constitutional Structure of the Commonwealth, (1960)
Wheare, K.C., Modern Constitutions, (1966)
Worrall, D., South Africa : Government and Politics, by D. Worrall (ed) 2ed (1975)

CHAPTER 1

INTRODUCTION

I THE SUBJECT - CONSTITUTIONAL CONVENTIONS IN SOUTH AFRICA

This work deals with aspects of constitutional development in South Africa from Union in 1910 until 1983.[1] More specifically, it examines the important role played by constitutional conventions in this country, drawing extensively upon local, British and other Commonwealth materials for this purpose.

Reference to British and other Commonwealth experience of conventions is justified, because South Africa enjoys a constitutional heritage richly endowed from the United Kingdom[2] and from the other former Dominions of the British Crown. The common bond between South Africa and many of these countries is a system of government often referred to as the 'Westminster System'.[3]

A brief description of this common constitutional heritage or 'Westminster System' is required before a proper analysis of constitutional conventions can be undertaken.

(1) Westminster System

The term 'Westminster System' has no precise constitutional or political meaning, although in its widest sense it may be understood to comprise all the main features of the British constitution.[4] In this context, the term describes a system of government which has evolved slowly over the centuries,[5] bearing certain constitutional features which are unique to the United Kingdom.

In another sense however, the term 'Westminster System'

has a much narrower meaning.[7] While the constitutions of the various Commonwealth countries differ in many respects from each other, most of them contain specific hallmarks which are designed to capture the spirit and practice of government in the United Kingdom.[8] These hallmarks normally consist of the following four constitutional characteristics:[9]

(a) The Head of State is not the effective head of government.

(b) The effective head of government is a Prime Minister, who presides over a Cabinet composed of Ministers over whose appointment and removal he has a substantial measure of control.

(c) The effective branch of government is parliamentary inasmuch as Ministers must be members of the legislature.

(d) Ministers are collectively and individually responsible to a freely elected and representative legislature.

(2) Westminster principles in the United Kingdom

So far as these principles concern the system of government in the United Kingdom, they have not been transmuted into rules of law. In many instances this has been the case because there has been a desire to avoid the formality, explicitness and publicity associated with changes in the law.[10] The constitutional behaviour of the Sovereign has changed remarkably in the last two hundred

years, but this has occurred without the intervention of new Acts of Parliament or the intervention of courts of law.[11] In place of Kings who used to govern by the prerogative there is now a constitutional monarchy.[12] The Queen is Head of State and government is carried on in her name, but it is government by an Executive answerable to, and dependent for its office upon, Parliament.[13] After the revolution settlement of 1688, it gradually came to be appreciated that the King could only govern through Ministers who had the confidence of Parliament.[14] Executive powers came to be exercised not by the Sovereign, but by a Prime Minister and other Ministers who became responsible to Parliament for the exercise of their powers.[15] All these changes have occurred notwithstanding the retention of forms and organs of government left over from the era of royal, personal rule.[16]

Consequently, although at common law, the Sovereign has unlimited power to appoint whom she pleases as Ministers of the Crown,[17] such appointments are now made by the Sovereign on the advice of the Prime Minister.[18] Her choice is additionally fettered because the Sovereign is obliged to appoint as Prime Minister the person who is in the best position to receive the support of a majority in the House of Commons.[19] No rule of law prevents the Sovereign appointing to Ministerial office a person who is outside Parliament, but the principle of Ministerial responsibility requires that a Minister should belong to one or other House of Parliament.[20] Through the exercise of the prerogative

the Sovereign may dissolve Parliament at any time, and thus cause a general election to be held.[21] Normally however, the Sovereign accepts the advice of the Prime Minister and grants a dissolution when this is requested.[22] In certain circumstances, the Sovereign may consider it prudent to dismiss Ministers of the Crown,[23] but events of recent years in Australia show the inherent dangers of exercising a prerogative power of this nature.[24]

The British example shows that while the outward legal form may be left intact, other means can be employed for discreetly managing the internal relationships of government.[25] In other words, the four basic hallmarks of the Westminster system are not to be found in the legal rules of the United Kingdom constitution,[26] but in a collection of non-legal rules.[27] These non-legal rules are usually referred to as 'Constitutional Conventions',[28] although such 'habits', 'usages' and 'practices' [29] are occasionally referred to as 'the positive morality of the constitution' or as the 'unwritten maxims of the constitution'.[30]

It can be argued that these constitutional conventions clothe the 'dry bones' of the law, making the legal constitution work, and keeping it in touch with the growth of ideas.[31] As MacIntosh has observed:[32]

> 'The essentially pragmatic nature of the British Constitution is that development comes not from departures of theory but from a gradual change in political feeling and practice which becomes accepted and is then registered in conventions ..... which in turn confirm and perhaps advance the original development.'

The analyst must turn to convention in order to understand how the constitution works in practice.[33] It is through convention that the four basic hallmarks of Westminster government will be uncovered.

(3) Westminster principles in the Dominions[34]

Considering that the Westminster principles of the British system of government are expressed largely through non-legal, conventional rules, the difficulties of constructing a similar system in any of the former Dominions of the British Crown can be readily appreciated. Dominion constitution-makers could either establish fixed legal rules to govern the executive branch and its relationship with the legislature, or they could leave many important rules to be captured by convention.[34] In the colonies, the legal approach was favoured.[35] It was felt that the change from Imperial control to virtual self-government ought to have its counterpart in law, and, if the constitutions of the colonies had been framed entirely to meet their wishes, there would have been some effort to embody in them the rules of constitutional 'practice' as law.[36] The British government objected to the legal approach.[37] Keith has asserted that they were reluctant to transmute into law the constitutional practices of the United Kingdom, because they were worried that this would hamper the growth of Dominion autonomy.[38] Without doubt, the process of turning constitutional conventions into exact and fixed legal rules would be a very complex one.[39] There are great practical

difficulties in codifying conventions such as the rules relating to the dissolution of Parliament and the dismissal of Ministers.[40] Furthermore, would such 'legalised' conventional rules be justiciable in courts of law?[41]

At the end of the day, the non-legal approach of the British prevailed.[42] De Smith has observed that a few modest concessions were made to the demands of clarity and practical convenience.[43] The concept of a parliamentary executive was acknowledged, coyly, in a legal rule which required Ministers to become members of Parliament within a prescribed period of time after appointment.[44] Annual sessions of Parliament were required, money resolutions needed the recommendation of the Crown, and Money Bills were to be introduced in the lower House of Parliament only.[45] On the whole however, the dichotomy of law and convention was preserved, and most of the really important constitutional conventions were left to the interpolator.[46] De Smith goes on to say:[47]

> 'To bring strict law into accord with political reality, to make it plain that the Governor-General, like the Queen, has only a narrow range of limited discretions, to mention the Cabinet, the Prime Minister and other conventional institutions, would be unconventional, indecorous, unacceptable. In such a climate of opinion were the constitutions of the older Dominions and the 1923 Constitution of Southern Rhodesia fashioned.'[48]

II ANALYSIS OF CONVENTIONS : A STRUCTURE

The next chapter will examine important legal rules of the South African constitution in the form that these originally took at Union in 1910. It will be shown that some of these legal

rules enhanced the Westminster system, while others appeared to undermine it. The South Africa Act of 1909 presented a truly confusing legal picture to those who were unfamiliar with its practical workings. Accordingly, the purpose of Chapter II is to highlight the fact that legal rules alone are insufficient to explain the workings of a constitution. Something more than a purely legal analysis of Statute or Common Law is needed in order to obtain a proper understanding of constitutional law.[49] Chapter III will analyse the constitutional conventions of the Union during the period between 1910 and 1939. Unfortunately, space does not allow for a complete historical review of conventions in South Africa. Consequently, the writer has had to draw a particularly narrow and somewhat sketchy outline of these non-legal rules.[50] Chapter III nevertheless will illustrate the importance of constitutional conventions in South African constitutional law. It will be shown that many of the characteristics of the Westminster system find expression exclusively through non-legal rules. More significantly perhaps, it will be shown that many of the legal and non-legal rules of the constitution are in direct conflict with each other. In any competition between the two types of rule constitutional conventions may often be more important.[51] Chapter III will also attempt to find some preliminary answers to one of the major questions which will be posed in this work. Accordingly, it is anticipated that initial conclusions will be drawn about the extent to which conventions in South Africa can be regarded as purely 'home grown'.

Chapter IV will explore the general scope of conventions. A definition of the terms 'Constitutional law' and 'Constitutional Convention' will be sought, and an attempt will be made to discover the boundaries within which the latter operates. Foundations will thus be laid for an analysis of the dichotomy between law and convention. This analysis will be developed further in subsequent chapters of this work. Chapter V will deal with the general character of conventions. Emphasis will be placed on the obligatory nature of these rules, and on the differences which exist between convention and other types of non-legal rule. The creation of convention will also be examined, because this can indicate a great deal about the true character of conventional rules. Chapter VI will analyse the relationship between law and convention; a subject over which leading writers have sharply disagreed in the past. Special attention will be devoted to the debate between Dicey and Jennings - two writers who have remained major contestants in this particular field. At the heart of the dispute between these two writers is a fundamental disagreement about the nature of the sanctions which give binding force to conventions. The different views of both writers will be explored in detail, and reference to subsequent writers and authorities will be made before any conclusions are drawn.

The arguments which were used respectively by Dicey and Jennings were developed within the strict confines of British constitutional law. The South African perspective has been rather neglected however, and it is the intention of Chapter VII to end this long-standing oversight. The sanctions which give

force to the conventions of the constitution will be examined within the framework of South African constitutional law. Conclusions will be drawn which are based on local circumstances and experiences within the context of the Westminster system between 1910 and 1984.

The Westminster system of government came to an end in South Africa with the introduction of a new constitutional dispensation in September 1984.[52] The behaviour of conventional rules under the new dispensation, however, remains a matter for speculation. No pointers to the future will bear the stamp of authority, unless there is a full appreciation of how conventions have behaved in the past. As far as the study of a constitution is concerned, it may be said that 'the past is always with us.' Chapter VIII will attempt to emphasize and summarize the main themes of this work. The conclusions which are drawn about the basic character of conventions under South Africa's Westminister system represent the foundations on which a future study of the 1983 tri-cameral constitution may be based.

The writer is aware of the fact that there may be alternative means of structuring the work which is to be presented in the following chapters. It is to be hoped, however, that the structure which has been suggested here will be easy to follow. It is designed to place due emphasis on the importance of general principle in relation to South Africa's rich conventional heritage.

III CONSTITUTIONAL CONVENTIONS : A REAPPRAISAL

Booysen and Van Wyk have said of constitutional conventions:[53]

> 'Hulle is gebruike wat met verloop van tyd onstaan om regering soepel en kragtig te hou. Hulle reflekteer ook die politieke moraliteit van die stetsel waarbinne hulle opereer. Vandaar dat konvensies in die Britse staatsreg nie noodwendig in die Suid-Afrikaanse staatsreg aangetref word nie en omgekeerd; of dat konvensies wat wel in albei stelsels figureer in een met groter bejeën word as in die ander.'

It is tempting to assume that because South Africa and the United Kingdom each bear evidence of a Westminster system of government, they share a common body of constitutional conventions as well.[54] While local distortions or adaptations of convention have been noted in the past,[55] these have not been regarded as evidence of any fundamental rift between the two countries.[56] It is questionable whether this remains an adequate approach to the study of constitutional conventions in South Africa. This problem has become more apparent in recent years, especially as the non-Westminster characteristics of the South African constitution have been increasingly highlighted.[57] Boulle has placed great emphasis upon the absence of universal adult suffrage in the Republic,[58] although he has pointed out a number of other respects in which the constitution of South Africa has long stood apart.[59] The ethnic orientation of party politics,[60] the absence of the classic two-party system in the legislature,[61] and the long history of separate political representation for Black and other groups,[62] lends credence to the notion that in many respects, the political culture of South Africa is markedly different from that of other Westminster societies.[63] The idiosyncratic development of the Republic's

constitutional system was further highlighted by the 'tri-cameral Constitution' which was introduced in 1984.[64] Now, more than ever before, it can be said that the 'politieke moraliteit' of South Africa, and the 'spirit and practice' of government in the United Kingdom, have become increasingly at odds with each other. A fresh approach has been needed for a long time vis-a-vis the study of conventions in the Republic. It is to be hoped that the work which is being presented here will satisfy this requirement. The aim of the research is to uncover the indigenous character of South Africa's conventional rules. It is no longer tenable to assume that they are derived from the equivalent rules which are to be found in the United Kingdom.

CHAPTER II

THE LEGAL FRAMEWORK OF RESPONSIBLE GOVERNMENT IN SOUTH AFRICA AT UNION

I RESPONSIBLE GOVERNMENT : THE WESTMINSTER EXPORT

Responsible government was granted to the South African colonies prior to Union in 1910. It was introduced at the Cape in 1872,[1] was transmitted to Natal in 1893,[2] and finally reached the Transvaal and the Orange River Colony in 1906 and 1907 respectively.[3] In essence, responsible government means that Ministers must have the support of the elected House of Parliament,[4] although Keith would go much further and ascribe to it all the basic hallmarks of the Westminster system of government.[5] In relation to British colonies generally he has remarked:[6]

> 'The vital step in the creation of responsible government was the decision of the British government to transfer executive authority from the Governor, chosen by it and irresponsible to the colonial legislature to ministers who should on the British system represent the will of the majority of the lower house of the legislature.'

In the Cape, Natal, Transvaal and Orange River Colony, the legal basis of responsible government was extremely limited. The vesting of executive authority in Ministers who enjoyed the support of a majority in the lower House of Parliament was not contained in a legal rule in any of these colonies.[7] Although the forms and trappings of government were based on the Westminster constitutional system, much remained governed by convention.[8]

To this situation, the Union of 1910 made almost no difference, because there was no radical departure from constitutional form.[9] The Union constitution was basically a replica on a larger scale, of the pre-existing constitutions of the four South African colonies.[10] The only major change effected was the substitution of one responsible government system in place of four such systems, and the consequent concentration of power in one central government.[11]

II RESPONSIBLE GOVERNMENT IN SOUTH AFRICA : THE LEGAL FRAMEWORK IN 1910

Although the legal foundation of responsible government was comparatively obscure, both immediately before and after 1910, the content of the relevant legal rules should not be overlooked. A vague and incomplete outline of the principles of responsible or 'Westminster' government can be traced in several of the provisions to be found in the South Africa Act of 1909. One example which may be cited is s 14, which used to acknowledge, coyly, the Westminster concept of a Parliamentary Executive.[12] The section said:[13]

> '...After the first general election of members of the House of Assembly...no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament.'

Another example is to be found in s 13 of the Act, which in many instances used to restrict the Governor-General's capacity to act without advice. The section established that:

> 'The provisions of this Act referring to the Governor-General-in-Council shall be construed as referring to the

> Governor-General acting with the advice of the Executive Council.'

The purpose of this section was to ensure that whenever the Governor-General acted under powers vested in the Governor-General-in-Council,[14] he would follow the advice of his Executive Council. Furthermore, as all the Ministers of State for the Union were members of the Executive Council,[15] the effect of the section was to oblige the Governor-General to follow ministerial advice.[16]

The importance of s 13 lies in the fact that the control and administration of 'native affairs and of matters specially or differentially affecting Asiatics' was vested in the Governor-General-in-Council.[17] In other words, in relation to the vast bulk of the Union's population,[18] government policy was not in any way subject to the individual influence or personal judgement of the Governor-General acting alone.

It has been said that one of the fundamental principles of a Westminster system of government is to ensure that the Head of State is not the effective head of government.[19] To a certain, but limited extent,[20] s 13 of the 1909 Act secured this principle in the Union.[21]

Finally, there were three statutory provisions of the South Africa Act which emphasised the importance of the principle of Ministerial responsibility to Parliament. The first of these was s 22, which required Parliament to meet in session at least once a year:

> 'There shall be a session of Parliament once at least in every year, so that a period of twelve months shall not

created. Furthermore, as the following examples will show, major conflict existed between the terms of the South Africa Act and some of the basic hallmarks of a Westminster system.

III RESPONSIBLE GOVERNMENT AND THE SOUTH AFRICA ACT : INCONSISTENCIES

(1) The Governor-General-in-Council and the Governor-General : a legal distinction.

A crucial distinction in the South Africa Act as originally enacted,[27] lay in the slight differences of wording between ss 12 and 13.

It has already been shown that many powers were vested in the Governor-General-in-Council[28] and that in accordance with s 13, such powers could be used only upon Ministerial advice.[29] The significant words in that section were: 'acting with the advice of the Executive Council'. Other powers were not vested in the Governor-General-in-Council however, and consequently, they were not regulated by the terms of s 13. The exclusion from the ambit of s 13 is highly significant, because it concerns major powers such as the power to choose and summon members of the Executive Council;[30] the power to appoint and dismiss Ministers;[31] the power to refuse the assent to legislation;[32] and the power to summon, prorogue or dissolve Parliament.[33] These important powers were vested in the Governor-General rather than the Governor-General-in-Council,[34] and powers vested in the former were regulated by the terms of s 12 rather than s 13. The crucial words in s 12 are:

'There shall be an Executive Council to advise the Governor-General in the government of the Union ...'

The above formula is different from the one contained in s 13[35]. The words; 'acting with the advice of ...', are noticeably absent.

The presence of two different formulae immediately next to each other in the same piece of legislation would suggest that the two different sets of powers were to be regulated in two different ways. Although case law established that powers regulated under s 13 had to be exercised upon Ministerial advice,[36] no such interpretation has been placed upon the wording of s 12. An inference can be drawn that insofar as the powers to choose and summon members of the Executive Council, to appoint and dismiss Ministers, to refuse the assent to legislation, or to summon, prorogue or dissolve Parliament were concerned, the Governor-General was entitled to act without following any advice.[37] In other words, he could use any of these powers in accordance with his own, personal judgement.[38]

(2) Further inconsistencies : Reservation of Bills

Further inconsistencies between the South Africa Act and the concept of responsible government could be detected in those provisions of the Union Constitution which dealt with reservation and disallowance. In relation to reservation, s 64 laid down:

'When a Bill is presented to the Governor-General for the King's Assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in

that behalf by the King ... that he reserves the Bill for the signification of the King's pleasure... '

Whenever a Bill was reserved by the Governor-General of the Union, the authority to grant the assent no longer vested in him.[39] Whether assent should have been granted or not became a question for the King himself to determine on the advice of his Ministers in the United Kingdom.[40] Whenever it was desired to give the Bill the force of law, assent had to be granted within one year of the Bill originally being presented to the Governor-General.[41] Reservation could take place in any one of the following ways:

(a) at the instigation of the Governor-General, acting personally and independently;[42]

(b) at the instigation of the Governor-General, acting under specific instructions from the King and the Imperial government;[43]

(c) at the instigation of the Governor-General, whenever compulsory reservation was required in terms of the South Africa Act;[44]

(d) at the instigation of the Governor-General, whenever compulsory reservation was required in terms of other Imperial statutes which applied to the Union.[45]

It is easy to conclude that an opportunity existed, for the government of the United Kingdom to interfere quite extensively in the legislative affairs of the Union. This was hardly in keeping with the notion of fully-fledged

responsible or 'Westminster' government.[46]

(3) Disallowance of Acts

Disallowance of legislation by the King was another feature of the Union constitution which conflicted with responsible government. The power to disallow or annul legislation was regulated by s 65 of the South Africa Act, which in the following terms provided:

> 'The King may disallow any law within one year after it has been assented to by the Governor-General, and such disallowance, on being made known by the Governor-General by speech or message to each of the Houses of Parliament or by proclamation, shall annul the law from the day when the disallowance is so made known.'

In these circumstances, the King always acted on the advice of his Ministers in the United Kingdom.[47] In practice however, the power of disallowance was never used,[48] and the advice tendered to the King concerning its exercise was always in accordance with the wishes of the relevant Dominion Ministry.[49] Nevertheless, an opportunity always remained for the Imperial government[50] to interfere in the legislative affairs of the Union; a prospect hardly in keeping with the basic characteristics of Westminster government.

IV THE SUBORDINATE NATURE OF RESPONSIBLE GOVERNMENT : IMPERIAL CONTROL

The discrepancy between responsible government on the one hand, and the constitutional system established at Union on the other, went beyond the provisions of the South Africa Act already referred to.[51] At the establishment of the Union in 1910, South

Africa was a subordinate colony of the United Kingdom, and responsible government was subject to restrictions other than those already enumerated. These may be considered under the following headings; the sovereignty of the Imperial Parliament; the dual nature of the Governor-General's functions; the territorial limitation upon the powers of the Union Parliament; and Ministerial access to the King. None of these restrictions are readily apparent in the South Africa Act of 1909.

(1) The Sovereignty of the Imperial Parliament

The Parliament of the United Kingdom could be described as 'Imperial' because it had full authority to legislate in all colonies of the British Crown.[52] Although originally governed by the common law of England,[53] this legal doctrine was subsequently regulated in terms of s 1 of the Colonial Laws Validity Act of 1865[54] as follows:

> '...An Act of Parliament or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express words or necessary Intendment of any Act of Parliament...'

The Parliament of the United Kingdom could also be described as 'sovereign',[55] because in the words of the Colonial Laws Validity Act 1865, s 2 :

> 'Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order or Regulation, and shall to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.'

Accordingly, neither past nor future Acts of a colonial legislature could conflict with any legislation of the Imperial Parliament which had been extended to the colony in question.[56] Prior to the 1865 Act, the legislative capacity of colonial legislatures was even more limited.[57] Nevertheless, although the Colonial Laws Validity Act may have represented an advance for self-government in the colonies, it left potentially large amounts of control in the hands of the Imperial Parliament at Westminster. In local terms this meant that a statute of the Union could be over-ridden at any time, through direct legislative action from London.

(2) The dual role of the Governor-General

The Governor-General of the Union was another major instrument of imperial control. Keith has observed in relation to the Dominions generally:[58]

> 'The position of the Governor-General of the Dominions served originally as the essential means of control of the local executive by the Crown. When responsible government was accorded, his functions assumed a clear dualism. In the main he acted as the constitutional head of the Government advised by ministers as is the Crown in the United Kingdom. But he had also to play the part of intermediary between the local and the Imperial authorities, and he owed his appointment to the Imperial Government by whose advise he could be removed from office.'

The position of the Governor-General of South Africa was much the same.[59] On the one hand he was the head of the executive government in the Union,[60] and in this capacity he acted as if he was a constitutional monarch. The British

Colonial Secretary argued as early as 1914, that the position of the Governor-General of the Union was, 'in the main largely analagous to that of the constitutional sovereign of this country'.[61] On the other hand, the Governor-General was an Imperial officer, appointed by the King on the advice of his Ministers in the United Kingdom.[62] This was not readily apparent in s 9 of the South Africa Act, which simply stated that the Governor-General 'shall be appointed by the King'[63] The more accurate situation could only be found by reference to the long-standing rules of British constitutional convention.[64] These rules required the King to exercise his powers in accordance with British Ministerial advice.[65] Consequently, the King only sanctioned the appointment of a particular individual as Governor-General when he was recommended to do so by his Ministers in the United Kingdom. In other words, the Governor-General was a British government appointee, an Imperial officer whose primary responsibility was to the Imperial government in London.[66] Using the Governor-General as an instrument of control, the Imperial government had substantial opportunities to interfere in the political life of the Union. Imperial interference through the reservation of Bills has already been examined in an earlier part of this chapter.[67] The Governor-General could also be used in many other instances however, as an instrument of Imperial control.

Potentially the most important method of control was highlighted by Kennedy and Schlosberg, who in the following terms noted:[68]

> 'In addition to the formal instructions accompanying the letters patent[69] the governor-general was, ... required to obey such other instructions as he might from time to time have received from the secretary of state for the colonies on behalf of the King.'

Provision for this form of control was not to be found within the ambit of the South Africa Act of 1909. It could be found, only after careful examination of the Governor-General's Letters Patent of 29th December 1909.[70] Hidden in paragraph I of the Letters Patent it is established:

> 'And We do hereby authorise and command Our said Governor-General ... to do and execute ... all things that shall belong to his said office ... according to such Instructions as may from time to time be given to him ... by Us through one of Our Principal Secretaries of State...'

The implications of such instructions were potentially very far reaching. The Imperial government could direct the Governor-General to reserve Union legislation of which it disapproved.[71] The Governor-General's power to choose and summon members of the Executive Council; to appoint and dismiss Ministers; to refuse the assent to legislation; or to summon, prorogue or disolve Parliament, could all be subject to direction by Ministers in the United Kingdom.[72] In practice therefore, all those powers which the Governor-General could exercise, without reference to the advice of his Ministers in the Union,[73] were subject to the potential direction of Ministers of the Imperial government at Westminster.

(3) Territorial limitation upon legislative power

No specific provision of the South Africa Act made it clear

that Union legislation had no extra-territorial effect.[74] In relation to colonial legislatures generally however, colonial legislation was denied any extra-territorial character.[75] In this regard, VerLoren Van Themaat has noted:[76]

> 'Volgens artikel 59 kon die Unieparlement wette maak for the peace, order and good government of the Union.[77] Dit was die vorm dat altyd gebruik is om aan 'n koloniale wetgewer taamlik algemene wetgewende bevoegdhede binne die kolonie se gebied te verleen, maar nie ekstraterritoriale bevoegdhede nie. Ons kan aanneem dat in die geval van die Unie dieselfde bedoeling bestaan het.'

One of the problems which faced Union legislators was that the nature of this limitation was sometimes difficult to determine.[78] It is entering the realm of speculation however, to wonder to what extent this technical limitation affected the conduct of responsible government in the Union.

(4) Ministerial Access to the King

Notwithstanding his separate and distinct role as an officer of the Imperial government, it has been noted in this chapter that the Governor-General was head of the executive government in the Union.[79] It would be more accurate to assert however, that he was merely the local representative of the King.[80] In strictly legal terms it was the King who was the ultimate source of executive authority in the Union, because as s 8 of the South Africa Act established:

> 'The Executive Government of the Union is vested in the King, and shall be administered by His Majesty in person or by a Governor-General as his representative.'

One difficulty with this formula was that it failed to

demarcate areas of authority between the King and his local representative in the Union. Both seemed able to exercise the same sort of executive powers. To all intents and purposes it seemed that the boundaries of their respective powers were conterminous. This difficulty was dealt with in s 9 of the Act, which provided:

> 'The Governor-General shall be appointed by the King, and shall and may exercise in the Union during the King's pleasure, but subject to this Act, such powers and functions of the King as His Majesty may be pleased to assign to him.'

The effect of s 9 was to reserve all executive powers to the King himself, except to the extent that the South Africa Act had made alternative provision. Accordingly, most executive powers remained with the King, with only two main exceptions. Firstly, there was a group of powers which the Act had vested in the Governor-General-in-Council. These powers could no longer be exercised by the King or his Governor-General without South African Ministerial advice.[81] Secondly, the Act permitted the exercise of several important powers by the Governor-General in an individual, distinct capacity.[82] In practice this represented the delegation of power from the King to the Governor-General on a permanent basis. The wording of s 9 was extremely flexible however. It gave room for the King to delegate remaining powers to the Governor-General, whenever he wished to do so.

Certain powers were delegated by the King to the Governor-General in the Royal Instructions of 1909.[83] Consequently, the Governor-General was permitted to pardon criminal

offenders or their accomplices, to grant remission of sentence, and (in capital cases) to exercise the prerogative of mercy, in accordance with these instructions.[84]

It remains a matter of some difficulty however, to establish which other powers were delegated by the King to his representative in the Union. It would be tempting to assert that no other powers were delegated to the Governor-General in South Africa, but an element of doubt renders this a somewhat uncertain proposition. Doubt is caused by certain key words in paragraph I of the Letters Patent. The paragraph laid down:

> '... And We do hereby authorise and command Our said Governor-General ... to do and execute in due manner, all things that shall belong to his said office ... according to the several powers and authorities granted or appointed him by virtue ... of these present Letters Patent...'

The key words are : 'all things that shall belong to his said office'. These words are extremely vague, and could encompass many executive powers. Coertze believed however, that the words were largely insignificant,[85] and that many executive or prerogative powers of the Crown remained undelegated.[86] Whatever the arguments, it is clear that the Governor-General was entitled to appoint new King's Counsel.[87] He was also entitled to promulgate subordinate legislation.[88]

An element of certainty can be assured nonetheless, to the extent that the following executive powers were retained by the King. According to Coertze and VerLoren Van Themaat, these included:[89]

(a) the appointment of the Governor-General;

(b) the appointment of the Officer Administering the Government;

(c) the grant of leave to appeal to the Privy Council.

These three powers were not delegated to the Governor-General, because they were specifically 'reserved' in the provisions of the South Africa Act.[90] On this point the two writers are in full agreement.[91] These were not the only powers however, which were clearly retained by the King. The only persons who could issue 'instructions' to the Governor-General of the Union for example, were the King, the Privy Council or one of the British Secretaries of State.[92] To permit the Governor-General to issue instructions to himself would have been a total nonsense, something which the Letters Patent of 1909 guarded against.[93]

Finally, the two writers are agreed that the following common law powers of the King, often referred to as the prerogative,[94] were not delegated to the Governor-General of the Union:[95]

(a) authority to create legal personality in royal charters and patents;

(b) authority to grant honours and titles;

(c) authority to enter into and to ratify treaties;

(d) authority to issue exequaturs to Consuls;

(e) authority to receive and despatch envoys;

(f) authority to declare war and to make peace;

(g) authority to regulate legal currency.

In addition, VerLoren Van Themaat asserts that the following prerogatives were not delegated by the King:[96]

(a) Annexation and 'acts of state',[97]

(b) sending or receiving ambassadors, diplomatic representatives and consular officials;

(c) issuing royal warrants.[98]

The non-delegation of the above listed executive or prerogative powers resulted in difficulties for the Union government. The King was required to act personally as head of the executive government in South Africa,[99] but he was inaccessible to his Ministers of State for the Union. They were separated by the length of a continent. Exercise of these prerogatives required the King's sign manual[100] and confirmation with the public seals which only Ministers in the United Kingdom possessed.[101] The co-signature of a Minister of the United Kingdom government was also necessary.[102] The whole problem was encapsulated by Coertze as follows:[103]

> 'Formeel het die Koning op advies van 'n Engelse minister gehandel, aangesien die stukke wat hy moes teken nog altyd deur die Engelse minister voorberei en geteken was. Trouens die hele stuk waarin die uitvoeringshandeling beliggam was, het alle tekens van 'n uitvoeringshandeling van die Koning as uitvoeringsorgaan van die Verenigde Koninkryk gedra. Die stuk was deur die Koning geteken, deur 'n Britse minister mede-onderteken en (waar dit gebruiklik was) geseël met òf die Grootseel òf Kleinseël van Groot-Brittanje.'

The non-delegation of prerogative powers therefore contained inherent dangers for responsible government in

South Africa. Union Ministers were completely dependent upon the co-operation and goodwill of the United Kingdom government, especially the latter's Minister of Colonial Affairs.[104] This has been graphically illustrated by VerLoren Van Themaat in the following comment:[105]

> 'Die Britse ministers kon dus elke uitvoerende handeling van die Unieministers laat verongeluk, eenvoudig deur die koning geen advies daaromtrent te gee nie. Hulle sou ook die koning kon adviseer om deur die Unie ministers voorgestelde uitveorende handelinge te wysig, of selfs om die uitvoerende gesag in die Unie uitsluitend op advies van die Britse ministers, en sonder om die Unieministers te ken, uit te oefen.'

Access to the King was also a potential problem in relation to the reservation of Bills or the disallowance of Acts.[106] Bills and Acts of the South African Parliament would be presnted to the King by a Minister of the Imperial government in London.[107] Whether or not the King would assent to a reserved Bill, and whether or not he would exercise the power of disallowance, were matters which were determined on the advice of his Ministers in the United Kingdom.[108] Consequently, the Ministers of State for the Union had little direct opportunity to influence the actions of the Sovereign in matters which were intimately concerned with the legislative affairs of South Africa.

V THE SOUTH AFRICA ACT AND RESPONSIBLE GOVERNMENT : SOME CONCLUSIONS

An intricate combination of legal rules formed the basis of South Africa's constitutional system at Union in 1910. These

legal rules could often be contradictory, and they came from a variety of legal sources. A substantial part of the legal framework of government was contained in the numerous provisions of the South Africa Act of 1909. Another part was to be found in the royal warrants issued under the prerogative, such as the Governor-General's Letters Patent and the Royal Instructions of 1909. A third part of the framework could be traced to the rules of English Constitutional law. This dealt with matters such as the scope and content of the royal prerogative,[109] and the extra-territorial limitation upon colonial legislation. A fourth part of the framework was to be found in the provisions of those Imperial Statutes which had been applied to the Union. An example of such a statute was the Colonial Laws Validity Act of 1865.[110]

An analysis of the legal rules from all these sources presented a very confusing picture. Some rules obliged the Governor-General to follow the advice of his Executive Council. Other rules allowed him in certain circumstances to ignore that advice. In some ways the Governor-General was a local representative of the King, while in others he was an instrument of imperial control. Some rules encouraged parliamentary control over the executive, others countered this with executive control over parliament. It would be natural to conclude that this mass of conflicting legal provisions would have led to chaos and confusion. Such a conclusion fails to take account, however, of the crucial role played by constitutional conventions.

In the chapter which follows, the impact of conventions on the legal framework of the constitution will be explored. The

combination of law and convention will be examined, to give an accurate impression of the Westminster system in South Africa.

CHAPTER III

SOUTH AFRICA'S WESTMINSTER HERITAGE. CONSTITUTIONAL CONVENTIONS 1910-1939 - A CASE STUDY

I CONSTITUTIONAL CONVENTIONS 1910-1926

In the early years of the Union constitution, very little was written about local constitutional conventions. No writer appears to have given much thought to the matter. Notwithstanding the fact that South Africa was a subordinate colony of the United Kingdom,[1] with a diverse cultural heritage and a small parliamentary electorate,[2] it was assumed that the Union had inherited the obligatory political rules or conventions of the United Kingdom 'en masse'. Kennedy and Schlosberg, who were among the earliest writers on the South African constitution remarked:[3]

> 'Generally, the cabinet system in South Africa follows British precedents in every respect; and every detail relating to dismissal, collective responsibility, the relation of the house to the cabinet,[4] and the dissolution of the house itself, as well as the relation in internal affairs between the cabinet and the head of state in South Africa, may be found in the well-known manuals of English constitutional law.'

VerLoren Van Themaat has come to a similar conclusion.[5] No thorough analysis of these conventions or 'precedents' was made by Kennedy and Schlosberg or by any other writer. It remains possible, nonetheless, to make some preliminary comments or observations about constitutional conventions in the years up to 1926.

(1) Cabinet Government and the Executive Council[6]

Notwithstanding the fact that the Executive Council

included all currently serving Ministers of State for the Union, this large, formal body never tendered advice to the Governor-General of South Africa.[7] Two reasons may be proferred for the apparent redundancy of the Executive Council. Firstly, it included numerous members from diverse political backgrounds, who could outvote the existing Ministers of State whenever they wished to do so.[8] Secondly, the views of the majority on the Council could be out of touch with majority feeling in Parliament or among the electorate as a whole.[9] The concept of government by a Cabinet responsible to an elected assembly is one of the hallmarks of the Westminster system.[10] It was also one of the hallmarks of the system of government in the Union,[11] although this is not readily apparent in the provisions of the South Africa Act.[12] A constitutional convention therefore developed, which demanded that only existing Ministers of State were summoned to advise the Governor-General of the Union.[13] They formed a body known as the 'Cabinet',[14] which acted as the vital link between Parliament and the executive authority which had been vested in the Governor-General.[15] The existence of a formal link between Parliament and the Executive is indicated in s 14 of the South Africa Act. This section, as it has already been noted,[16] required Ministers of State to be or become members of the legislature within three months of their appointment. On the whole however, the link between Parliament and the Executive was regulated by constitutional convention. This

will become apparent in the following paragraphs.

(2) The appointment and dismissal of Ministers

According to s 14 of the South Africa Act 1909, the power to appoint and dismiss Ministers of State was vested in the Governor-General of the Union.[17] Neither power had to be exercised in accordance with the advice of the Executive Council.[18] Still less did the Act require their exercise in accordance with advice tendered by the Cabinet.[19]

The legal position however, bore little resemblance to reality. The appointment and dismissal of Ministers was governed almost entirely by constitutional conventions.

One of the major constitutional conventions demanded that the Cabinet establish working control over the lower House of the legislature.[20] In South African terms this meant that the Ministers of State, who together formed the Cabinet of the Union, had to enjoy a working majority in the House of Assembly.[21] This constitutional convention drastically reduced the Governor-General's room for manoeuvre, whenever the question of ministerial appointments or dismissals arose.

The Cabinet appointed by the Governor-General had to enjoy a working majority in the lower House, but how was he to ensure that this came about? When he appointed new Ministers of State, how was he to determine if they enjoyed majority support in the directly elected House? This problem was dealt with by other constitutional conventions, which regulated the procedure for appointments and dismissals in the following manner:

(a) The leader of the majority party and Ministerial appointments

The Governor-General did not personally undertake the task of forming a Cabinet for the Union. Instead, he summoned the person who he considered most fitted for the purpose, and requested him to undertake the task of constructing a team of Ministers.[22] In practice, the choice of candidates available to the Governor-General was extremely limited. Kennedy and Schlosberg commented in this respect:[23]

> 'Broadly stated, the person to be summoned is the one most likely to be able to form a stable government. The choice is in practice limited to one or other of the persons recognised by parliament as the leaders of the party which commands a majority in the house of assembly.'

On the whole, constitutional convention required that Ministers be drawn from the ranks of the House of Assembly rather than from the Senate.[24] Consequently, the leader of the majority party in the House of Assembly would draw most of his future Cabinet colleagues from the ranks of his supporters in the directly elected House.[25]

Once the majority leader had completed the construction of his Ministerial team, he submitted the names of his proposed Ministers to the Governor-General.[26] The latter would then 'appoint' Ministers of State for the Union,[27] in accordance with the powers vested in him by s 14 of the South Africa Act.[28] The procedure adopted for the appointment of Ministers was thereby completed.

(b) The Prime Minister of the Union : appointment and dismissal of Ministers

The pivot of the newly appointed Cabinet was the Prime Minister,[29] who was the person who had been invited by the Governor-General to form a new administration.[30] The existence of the Prime Minister, and the nature of his rights and obligations were denied any legal recognition in the provisions of the South Africa Act. The only references to the Prime Minister, and the only references to his rights and obligations were to be found in the Schedule to the South Africa Act.[31] The Schedule to the Act was of limited importance however, because it was only concerned with future possible South African administration of the High Commission territories.

In relation to the appointment and dismissal of Ministers nevertheless, the conventional powers of the Prime Minister were quite considerable. In conventional terms he continued to enjoy the power to appoint Ministers of State.[32] In other words, the Prime Minister succeeded to the powers he had previously exercised as leader of the majority party in the lower House.

In certain respects however, an encumbent Prime Minister enjoyed wider power to nominate his colleagues to Ministerial office. This was due to the existence of one major advantage which he was able to maintain against all his opponents. By convention a Prime Minister could remain in office after the loss of his majority, on condition that no alternative leader in the House of Assembly was able to muster majority

support.[33] This constitutional convention was followed in 1915, when General Botha clung to the premiership after the elections of that year.[34] Although the Prime Minister's party had lost control of the lower House, none of the other parties were in any better position to dominate the life of the directly elected House.[35] The convention was even more clearly used after the general elections of 1920, when General Smuts was able to cling to his position.[36] His supporters were outnumbered in the House of Assembly by members of the opposition National Party.[37] The latter failed to win 68 seats however, and therefore neither of the parties could gain overall control.[38] In these circumstances, a Prime Minister could still wield a considerable amount of power, because he was still able to make all Ministerial appointments.[39] What is more, this conventional power could be used by the Prime Minister to his considerable political advantage. In 1920 for example, General Smuts was able to engineer the merger of the Unionist and South African Parties, after first promising representation in the Cabinet to the Unionist leader and his colleagues.[40] In this way, the Prime Minister was able to construct a new majority in the House of Assembly, and secure working control of the House for his embattled administration.[41]

A Prime Minister, once appointed, could also dismiss his Ministers of State.[42] According to legal theory, Ministers held office at the pleasure of the Governor-General.[43] In practice however, Ministers held office at the pleasure of the Prime Minister.[44] Normally, a Minister who had incurred

the displeasure of the Prime Minister would resign first rather than face the humiliation of dismissal.[45] By convention however, a reluctant Minister could be dealt with in either of the two following ways.

Firstly, the Prime Minister could give advice to the Governor-General, requesting the latter to exercise his legal power of dismissal under s 14 of the South Africa Act.[46] This method of dismissal was never used in the Union however.[47] Secondly, and as an alternative, the Prime Minister could himself resign.[48] According to Keith, this second course of action was more elegant and courteous than the first method of removal.[49] As soon as the Prime Minister had resigned, he would be commissioned again by the Governor-General to form a new administration.[50] In his subsequent selection of a new team of Cabinet colleagues, the Prime Minister would then exclude the Minister who had incurred his displeasure.[51] The recalcitrant Minister was thereby effectively dismissed.

This second form of dismissal was twice resorted to in the Union. It was used by Prime Minister Botha against General Hertzog in 1912, when the latter embarassed the government with his strongly nationalistic views.[52] In 1928 it was used by Hertzog himself, when, as Prime Minister, he removed W B Madeley after a conflict over 'Native' policy.[53]

It is apparent that the Governor-General had little control over Ministerial appointments. It is also clear that he had little control over Ministerial dismissals. He was unable to fill the Cabinet with rubber-stamp nominees, because

constitutional convention demanded that he secure a Cabinet with majority support in the House of Assembly. It can be said that the legal powers of the Governor-General were curtailed by political reality. He had to act on advice. Normally that advice was given by the Prime Minister of the Union. Occasionally, if the latter had lost control of the lower House, advice would be given by an alternative politcal leader who enjoyed majority support in the House of Assembly.[54]

The fact that the Governor-General had little control over the composition of the Cabinet was of crucial importance to the Union constitution. It has already been noted that the Cabinet acted as a vital link between Parliament, and the executive authority which had been vested in the Governor-General by the South Africa Act.[55] At this stage, the nature of that link should have become clearer. The Governor-General was advised by a Cabinet. The Cabinet was filled by members of the legislature, and these were largely drawn from the ranks of the House of Assembly. Appointments to the Cabinet were effectively made by the individual who commanded majority support in the House of Assembly. Consequently, the Governor-General was advised by a body of Ministers who reflected majority feeling in the directly elected House.[56] Therefore, to some extent at least, when the Governor-General acted on advice, he acted with a considerable degree of popular support. Executive action was based upon the continuing confidence of Parliament, without which, no government could continue to maintain itself in office.[57]

(3) The Relationship between the Governor-General and the Cabinet

Although the Cabinet acted as a vital link in the constitutional system, the Governor-General was not legally obliged to follow its advice. This has already been explained in Chapter II.[58] S 13 of the South Africa Act, and the meaning of the term 'Governor-General' in the Interpretation of Laws Act, did attempt to restrict the ability of the Governor-General to act without advice.[59] In respect of certain powers however, the Governor-General could act in conflict with Ministerial advice. A strict reading of the South Africa Act would suggest that the Governor-General could choose and summon members of the Executive Council, appoint and dismiss Ministers, refuse the assent to legislation, and summon, prorogue or dissolve Parliament, without having to follow Cabinet advice.[60]

The intervention of constitutional convention however, has meant that legal theory did not accord with political reality. This has already been highlighted in relation to the selection and summoning of members of the Executive Council.[61] It has also been highlighted in relation to the appointment and dismissal of Ministers.[62] There are two powers of the Governor-General which are left outstanding however, and these will need to be looked at under the following headings:

(a) The Royal Assent

A literal interpretation of the South Africa Act gave the Governor-General a veto over Union legislation.[63] The veto

was never used however,[64] and the idea of using it was never seriously entertained. The apparent redundancy of the royal veto was graphically illustrated as early as 1914.

In January of that year, General Smuts illegally deported ten labour leaders from the province of Natal.[65] When the South African Parliament passed an Indemnity Bill to safeguard the actions of the government, the Governor-General assented to the legislation.[66] Any attempt to exercise the veto would have placed the Governor-General in considerable difficulties. Keith has remarked, in comments which could have applied to the Union:[67]

> 'The Governor-General had no doubt the power to refuse assent, but such a refusal was obviously a drastic measure which would be gravely resented, and would render relations between the ministry and the Governor-General difficult.'

During the 1914 crisis, the British Colonial Secretary described the position of the Governor-General as being 'in the main largely analagous to that of the constitutional sovereign of this country.'[68] Whether or not that analogy was strictly accurate,[69] it influenced the attitude of the Imperial government, to whom the Governor-General was ultimately accountable.[70] The Sovereign of the United Kingdom has not exercised the royal veto since Queen Anne refused the assent to the Scottish Militia Bill in 1707.[71] In view of this fact, an equivalent exercise of the Governor-General's veto would have been all the more difficult to explain and justify.

Other assertions of the British Colonial Secretary were

quite revealing. He argued that reservation or disallowance of the Indemnity Bill was unthinkable, describing such Imperial intervention as 'unprecedented and wholly unjustifiable' because 'such legislation is essentially one of the attributes and prerogatives of the responsible and popularly elected Parliament of South Africa.'[72] In these circumstances, it is hardly suprising that a royal veto by the Governor-General would have been considered inappropriate.

Resort to the veto power could never be completely ruled out however. Assent could not be assumed for legislation designed to extend the life of an existing Parliament.[73] Such extensions represented a grave intrusion on the rights of electors,[74] and in the words of Keith:[75]

> 'It seems clear, therefore, that in these circumstances a Governor is bound to weigh beside the advice of the ministry the welfare of the territory and their probable wishes.'

In the Union however, as it has already been noted, the veto power of the Governor-General was never used.

(b) Power to summon, prorogue or dissolve Parliament

Authority to summon or prorogue the Parliament of the Union was exercised by the Governor-General on Ministerial advice.[76] The existence of this rule was entirely conventional however. No indication of its presence could be found in the South Africa Act.[77]

Generally speaking, almost all the powers of the Governor-General were exercised on Ministerial advice.[78] In relation

to the dissolution of Parliament however, the constitutional conventions of the United Kingdom and the Dominions were divergent. The differences in convention were explained by Keith in the following manner:[79]

> 'That a Governor should act on ministerial advice has been admitted in the Dominions, but with an important proviso: a Governor may reject advice if he can secure, in the event of the resignation of the ministry in consequence of his action, a new ministry which will accept responsibility ex post facto for his rejection of advice ... While in England this view has almost died out, it was regularly in use in the Dominions ... as regards dissolutions of Parliament.'

In the United Kingdom, the King was normally expected to grant a Ministerial request for the dissolution of Parliament.[80] In the Dominions, the position of the Governor-General was different. After receiving a request for dissolution, Keith has noted:[81]

> 'It was deemed to be the duty of the Governor to determine, after careful investigation of the position, whether he could not find a new ministry which would carry on the government without a dissolution.'

In part, the reason why the older convention survived in the Dominions was due to the fact that the hereditary monarch was removed from the daily afairs of government.[82] In his place there was a Governor-General, a local representative who normally held office for only five or six years.[83] With a limited term of office, the Governor-General had far less need to avoid political controversy than the Sovereign.[84] A politically partisan Governor-General could be unpopular,[85] but a politically partisan Sovereign could lose his throne.[86]

In South Africa between 1910 and 1926, it was unnecessary for the Governor-General to get involved with political controversy about the dissolution of Parliament. The general elections of 1915 and 1920 were more or less unavoidable, because the five year life-span of the existing Parliament was coming to a close.[87] Elections were a necessity, whether or not a new majority could have been constructed in the House of Assembly.

In 1921, it would have been possible for the Governor-General to refuse a dissolution to General Smuts, if an alternative Ministry could have been established which commanded the support of the House of Assembly.[88] Realistically however, this would have required Unionist support for a National Party-led government.[89] The prospects for such an alliance of die-hard political enemies could not have been a serious one.[90] Consequently, the Governor-General took the only course of action which was properly open to him when he granted the dissolution.

Again, in 1924, the Governor-General could have refused a dissolution to General Smuts.[91] Realistically however, it would have been almost impossible for the Governor-General to find an alternative Ministry, which would have accepted responsibility for his refusal of advice. The party headed by General Smuts had enjoyed such a large majority in the House of Assembly, that it would have taken a split in the party and substantial defections to the opposition, before an alternative Ministry could have assumed power without elections.[92]

In practice therefore, the analogy between the Governor-General and the Sovereign was not completely wide of the mark. The Governor-General, like the Sovereign, acted on advice, dissolving Parliament in accordance with the wishes of an existing Ministry.[93]

(c) The Governor-General and the Cabinet : an exceptional precedent

Through a combination of both law and convention, the Governor-General was expected to act on the advice of his Ministers of State. Only a few exceptions to this norm existed. In law, the Governor-General could be obliged to act in accordance with the wishes of the Imperial authorities in London.[94] By convention, he could refuse a request for dissolution from his Ministers, and he could veto legislation which was designed to extend the life of an existing Parliament.[95] On the whole however, the Governor-General acted on Ministerial advice.

One example may be cited nevertheless, of an instance when there was a refusal to follow Ministerial advice. This occurred in 1914, when the Acting Governor-General, Lord De Villiers, refused to proclaim Martial Law.[96] He refused to participate in activities which went beyond what was strictly lawful.[97] Lord De Villiers established a precedent which does not appear to have been followed in later circumstances.[98] No other examples can be cited of a Governor-General refusing to follow the advice of his Ministers.[99] Lord De Villiers' actions should perhaps be seen in isolation. As Chief Justice of South Africa as well

as Acting Governor-General[100] any proclamation of Martial Law could have placed him in an invidious position. Without a retrospective Act of Indemnity, many actions which would have been perpetrated under Martial Law would have been totally illegal. After the return of peace these could have become the subject of proceedings in Courts of Law.[101] Naturally, such potentially embarassing developments were something which the Chief Justice and Acting Governor-General of the Union would have preferred to avoid. It is doubtful if any general principle or rule can be drawn from such an isolated departure from the established norm.

(4) The resignation of the Cabinet

According to constitutional convention, if the Cabinet lost control of the House of Assembly through internal dissension, or through the coalition of opposition party elements, or because of other grounds, it could choose between resignation or dissolutiion.[102] Normally, rather than admit failure, and in an attempt to regain the confidence of Parliament, the Cabinet would seek the dissolution of the legislature.[103]

During the early years of the Union constitution, no clear-cut example of this convention could be found. The Smuts government of 1920-1921 struggled at times to keep control of the lower House, but it avoided defeat and sought new elections at its own choosing.[104]

The constitutional conventions governing the resignation of the government were further amplified by Keith. He commented, with reference to the Dominions generally:[105]

> 'The position of ministers on defeat at an election is not more clearly defined than in the United Kingdom. In the Dominions, as in the United Kingdom, the old practice of holding office until ejected by a vote of no confidence has given way normally in favour of resignation. All depends, of course, on what is not always easy to decide, whether the Opposition parties can form an effective Government. If there is doubt it is quite legitimate to wait and see.'

In the 1915 general elections, General Botha's government lost its House of Assembly majority.[106] The Prime Minister did not immediately resign, because it was not clear that the opposition parties could combine to form an effective government.[107] It subsequently transpired that he could retain the confidence of Parliament with Unionist support, enabling his Cabinet to retain its hold on power until the next general elections in 1920.[108] General Smuts behaved in a similar fashion after the indecisive elections of 1920.[109] His decision not to resign was an equally legitimate one, because the opposition parties would have been unable to combine to form an effective government.[110]

After the 1924 elections however, General Smuts adopted the alternative course. He resigned immediately, and did not wait to meet Parliament,[111] because it was clear that the opposition could form an effective government. Prior to the elections, a compact had been concluded between the leaders of the National Party and the Labour Party.[112] Their common electoral strategy paid dividends. Out of 135 members elected to the House of Assembly, 63 were from the National Party and 18 from the Labour Party.[113] The 'Pact' alliance had secured a clear majority in the lower House, where they

could easily outvote the 53 South African Party and one Independent members.[114] The Governor-General called upon the leader of the National Party, General Hertzog, to form a Ministry.[115] The new Prime Minister went on to consolidate the election pact with the Labour Party, bringing three of its leaders into the National Party dominated Cabinet.[116]

After an election defeat therefore, it can be said that the Cabinet would be expected to resign, unless there was a strong possibility of retaining the confidence of the lower House.

(5) Collective responsibility of Ministers

There are three basic strands to the convention of collective responsibility:[117]

(a) Ministers of State must account to Parliament, especially the lower House, for decisions which have been taken by the Cabinet.[118]

(b) A Minister who remains a member of the Cabinet may not publicly criticise or dissociate himself from government policy.[119]

(c) The process by which policy decisions are reached by Ministers should be kept secret.[120]

A Minister who feels unable to obey these basic requirements of collective responsibility would be expected to resign.[121]

In South Africa, almost from the inception of the Union, General Botha had difficulties applying the convention of

collective responsibility to his Ministers.[122] Kruger blames a lack of political cohesion within the Cabinet for the Prime Minister's considerable problems.[123] He has commented, with reference to that first Cabinet of the Union of South Africa:[124]

> 'There was little solidarity in a Cabinet formed during moments of enthusiasm for Union. It was based too much on a mere desire for union and on Botha's endeavour to please the provinces. This accounted also for the regional representative character it bore. The Government moreover included various elements from Conservatives to Liberals, from pro-British to anti-British and nationalist-minded Free Staters. It was the mouthpiece of a political party which was not in existence when the Government was formed, and in many respects that party did not yet know its own mind. Apart from the vague ideal of national unity all members of the South African Party were certainly not united on major principles.'

The first public strains appeared in June 1912.[125] H C Hull, who was the Minister of Finance, openly criticised his ministerial colleague at the Department of Railways and Harbours.[126] Hull felt that J W Sauer was acting far too independently as Minister of Railways and Harbours, and that this would be to the ultimate detriment of the Treasury.[127] Such public bickering created an impossible situation for the Prime Minister.[128] He had to remove one of the contesting Ministers if he wished to restore the public semblance of cohesion in his administration. In the end, the Minister of Finance was compelled to resign,[129] and a further breakdown in constitutional convention was temporarily averted.

Shortly after Union in 1910, General Hertzog reluctantly bowed to the feelings of his colleagues, and he agreed to accept amendments to the language policy governing schools in

the Orange Free State.[130] In 1911-1912 however, the incompatability of his views with continued membership of the Cabinet resulted in major political upheaval. In various public speeches throughout the country, Hertzog began to expound his 'South Africa First' philosophy.[131] This threatened a storm of opposition which even alarmed the Prime Minister.[132] Hertzog was unabashed however, and in key speeches at Smithfield and De Wildt in October and December 1912, he repeated his view that the Imperial connection was good only as far as it served the interests of South Africa.[133] Colonel Leuchars, who represented Natal in the Cabinet, threatened to resign if the Prime Minister did not dismiss Hertzog.[134] When General Botha did not act immediately, Colonel Leuchars carried his threat into effect.[135] In order to retain an element of political balance in his administration, the Prime Minister asked General Hertzog to resign as well.[136] Hertzog's refusal to do so was followed by the Prime Minister's own resignation.[137] General Botha accepted the premiership for a second time, although in his new administration he deliberately excluded Hertzog from the Cabinet.[138]

The failure of that first Botha Cabinet to contain its policy differences had enormous consequences. It led to the foundation of the National Party in January 1914,[139] and to the eventual accession of Hertzog to the premiership in 1924.[140]

Matters did not necessarily improve, once the split between the South African Party and the National Party had been

formalised. The Nationalist-dominated Cabinet headed by General Hertzog[141] also suffered from a breakdown of collective responsibility. In 1925 for example, Tielman Roos, then Minister of Justice in the Hertzog Cabinet, publicly expressed himself against the 'Native' policy enunciated by the Prime Minister.[142] Kruger's observations[143] cannot account for such a public disagreement between the leader of the National Party in the Transvaal[144] and the Nationalist Prime Minister of the Union. Malan, on the other hand, has accounted for the weakness of collective responsibility in South Africa in the following terms:[145]

> 'From 1910 till 1924 the first three Prime Ministers of the Union and some of their most influential colleagues came from the late republics with a much longer and more intimate experience of the working of the republican than of the responsible government system, which they were now called upon to apply.'[146]

A lack of political cohesiveness also plagued General Hertzog's first administration. His coalition partners in the Labour Party split into two opposing factions, both of which had representatives in the Cabinet.[147] The Cabinet was therefore composed of a National Party contingent and two different versions of the Labour Party. The Prime Minister was unable to maintain control over such a diverse group. His Minister of Posts and Telegraphs refused to obey Cabinet policy relating to Black trade unions.[148] To make matters worse, the Minister received a delegation from the Industrial and Commercial Workers Union in defiance of the Prime Minister's express wishes.[149] The Minister, who was the sole

representative of one of the warring Labour Party factions in the Cabinet,[150] refused to resign when asked to do so.[151] Hertzog reacted to this challenge by handing his own resignation to the Officer Administering the Government.[152] Consequently, it was a breakdown of the convention of collective responsibility which brought the first Hertzog administration to an end in 1928.

II CONSTITUTIONAL CONVENTIONS 1926-1939

(1) The Imperial Conference of 1926

The year 1926 represented a watershed in the constitutional development of South Africa and of the other self-governing colonies of the British Crown. The Imperial Conference of 1926 overshadowed Colonial or Imperial Conferences of other years, because it represented a turning point.[153] A new status for the self-governing colonies was accepted which replaced notions of 'Empire' with the 'British Commonwealth of Nations'.[154] The key decision of the Conference was the adoption of the following resolution:[155]

> '... we refer to the group of self-governing communities composed of Great Britain and the Dominions.[156] Their position and mutual relation may be readily defined. They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'

One of the many consequences of this decision was that the position of the Governor-General had to be re-examined in relation to all the Dominions.[157] The dual nature of his

functions, which forced him to be a representative of the King and a representative of the Imperial government, had to be brought to an end.[158] The existing arrangements were incompatible with the concept of equality of status. Accordingly, the Imperial Conference of 1926 adopted the following resolution:[159]

> 'In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of the Government.'

These words would appear to have two, inter-related intentions. Firstly, a Dominion Governor-General was no longer expected to act on behalf of the Imperial authorities in London. Secondly, the relationship between a Governor-General and his Cabinet was to be the same as the relationship between the King and the United Kingdom Cabinet. In respect of the second intention however, Wheare has argued that the resolution is ambiguous.[160] It would seem to have caused problems in two particular areas, both of which relate to the dissolution of Parliament.

(a) Dissolution : the Governor-General's discretion and the King's discretion

Prior to 1926, Governors-General had a discretion to refuse any Ministerial request for the dissolution of Parliament. This is a proposition which Wheare and Keith have both been willing to accept.[161] Difficulties arise however, because

the conventional rules which governed the relationship between the King and his Ministers in the United Kingdom were not clearly defined.[162] Keith argued that while a Governor-General was entitled to refuse a dissolution prior to 1926, the King was not.[163] Wheare, on the other hand has pointed out that many authorities have recognized the King's power to refuse advice.[164] Consequently, before the Imperial Conference of 1926, controversy about whether the discretionary power of the King was the same as the discretionary power of the Governor-General had not been authoritatively settled.[165]

In Keith's opinion, the intention of the 1926 resolution was to assimilate Dominion with British usage vis-a-vis the power of dissolution.[166] According to Keith, the Conference was reacting to recent events in Canada, where the Governor-General had refused a dissolution to one Prime Minister, while granting it to another who did not even command the confidence of the lower House.[167] As far as Keith was concerned, placing a Governor-General in the same position as the King would mean that the former's discretion to refuse a dissolution had come to an end.[168] In other words, controversies such as the one which had overwhelmed Lord Byng in Canada during 1926 would not happen again. Wheare however, was unconvinced by these assertions. He has accepted that one of the intentions of the 1926 resolution was to assimilate Dominion with British usage.[169] In the following comment he noted however, that because British

usage or convention was unclear in 1926, the effect of the resolution was ambiguous:[170]

> '... the Governor-General must act in accordance with the same rules as the King recognizes in his relations with his ministers. No attempt was made to indicate what these rules were. The problems of discretion still remain unsolved.'

In relation to the dissolution of the United Kingdom Parliament, the King's discretion to act without Ministerial advice has been the subject of endless debate. Wheare has made reference to analyses of the issue which were prominent during the Irish Home Rule crisis in 1912-1914.[171] He refers for example, to a letter written by Sir William Anson to 'The Times' in 1913.[172] This letter was regarded as an authoritative assertion of the King's inherent constitutional right to act without advice.[173] Among other things, Sir William Anson commented as follows:

> 'For every public act of the King his Ministers must accept responsibility. If, therefore, the King should desire to dissolve Parliament ... and if the Government are of the same opinion, the prerogative of dissolution would be exercised in the ordinary course. If not, it would be necessary to ascertain beforehand whether an alternative Ministry was prepared to accept the responsibility of a dissolution...
> It really comes to this, that if the King should determine, in the interests of the people, to take a course which his Ministers disapprove, he must either convert his Ministers to his point of view, or, before taking action, must find other Ministers who agree with him.'

This point of view was further enhanced by a letter which Lord Hugh Cecil wrote to 'The Times':[174]

> 'It is certainly an undisputed rule of our Constitution

> that the Sovereign must never act upon his own responsibility - that is, he must always have advisers who will bear the responsibility of his acts. But this does not mean that he must always automatically accept the advice of those who are his Ministers at a given moment ... The doctrine - sustained, I believe, both by precedent and authority - is that the Sovereign may refuse the advice of his Ministers, though that refusal should involve their resignation, and may even (in an extreme case) dismiss his Ministers; but that these powers are in practice closely restricted by the condition that he must find advisers to bear the responsibility of his action who have the confidence of the House of Commons; or can obtain that confidence after a general election.'

The opinions which were propagated in Anson's letter were also adopted by Dicey.[175]

'The Times' however, in a leading article dated 8th September, 1913, adopted a totally different approach. The article made a distinction between the legal and the conventional powers of the King in the following terms:[176]

> 'Legally there is no question that under the Constitution there are certain reserved rights of the Crown, but they are atrophied by long disuse ...[177] It is, however, in our judgment, inconceivable that the Sovereign should contemplate a step which might lead to an apparent disagreement between the occupant of the Throne and the majority of his people ... A dissolution of Parliament by an exercise of the Royal Prerogative, proprio motu regis, might be followed by a vindication at the polls of those very Ministers whose advice had been set aside. The proposal, in fact, has only to be stated with its implications for its constitutional absurdity to be revealed.'[178]

Like 'The Times', Morgan was opposed to the exercise of a discretionary power by the King, because he was concerned that the King would become politically compromised by such action.[179] The Prime Minister of the United Kingdom, Herbert Asquith, was of a similar opinion.[180] In a famous memorandum to the King, he referred to the political dangers which would

confront the Monarchy if it attempted to dismiss one set of Ministers and have them replaced by another.[181] Such action he feared, would induce the Crown to become a football between contending factions, especially in any subsequent parliamentary elections.[182] There can be little doubt that the King's refusal to dissolve Parliament would have been tantamount to Ministerial dismissal.[183] It would almost certainly have led to the resignation of the existing government.[184] Many writers have subsequently aligned themselves with Asquith's point of view.[185] It would seem therefore, that notwithstanding the King's legal rights, constitutional reality prevented him from refusing a dissolution of Parliament. The King's legal rights could only be exercised on the advice of his existing Ministers.

This conclusion must be read however, subject to at least two provisos. Firstly, the King himself, during the Home Rule crisis of 1912-1914, questioned the contention that he was obliged to act on the advice of his existing Ministers.[186] The King maintained the view that if his personal intervention could prevent a national disaster, help to avoid bloodshed among his subjects, or somehow produce a calming effect in periods of unusual national tension, he would not necessarily be bound by the advice of his existing Ministers.[187] Secondly, as Markesinis has noted:[188]

> 'Most constitutional lawyers seem to support the idea that in a divided House, and particularly with a multi-party system, a minority Government - whether defeated or undefeated - is not entitled to a dissolution if an alternative Government is possible and furthermore is

capable of carrying on with the existing House.'

Markesinis has argued however, that this second proviso is open to doubt.[189] A refusal to grant a dissolution to a minority government would drag the King into the arena of political controversy, whether or not an alternative Ministry could have been constructed without elections.[190] Markesinis has pointed out that 'if there is anything worse than a biased and partial Monarch, it is a Monarch who is believed to be biased and partial'.[191] Such perceptions would not alter simply because one administration had the support of the House of Commons while its predecessor did not. Accordingly, whether or not the King would be constitutionally justified in refusing a dissolution to a minority government is irrelevant. The crucial factor is the political wisdom of exercising such a 'reserve' power, which would vary depending on the circumstances associated with each request for a dissolution.[192] It can be suggested however, that the refusal of a dissolution would be justified only in the gravest national emergency. What would constitute 'a national emergency' nonetheless would be open to widely different interpretations. It is a problem which remains unsolved.[193]

The 1926 Imperial Conference made no attempt to clear up the ambiguity and confusion. In some ways, it actually made matters worse. Before 1926, it was a fairly settled conventional rule that the Governor-General could refuse a dissolution in certain circumstances. After 1926, it became

difficult to ascertain the true relationship between the Governor-General and his Ministers. The attempt to equate their relationship with that between the King and Ministers in the United Kingdom did not bring those difficulties to an end. The discretionary power of the King to act without Ministerial advice was the subject of endless controversy. Two schools of thought developed in the early part of the twentieth century; one led by Anson and Dicey; the other led by Asquith, Morgan, 'The Times', and later writers such as Jennings and Markesinis.[194] Lord Esher vacillated between the two opposing views.[195] The conference made no attempt to settle the resultant confusion.

It is tempting to assert that the Governor-General lost his discretionary power to act without advice. It is tempting to argue that any attempt to exercise a 'reserve' power would have been highly injudicious. It would not be difficult to assert that the King had lost the ability to manoeuvre independently of his Ministers, because of the threat which would otherwise be posed to the security of his throne. The same could not be said however, about a Governor-General.

The method of appointing a Governor-General differed markedly from methods of appointing a hereditary Monarch.[196] Furthermore, the character of the tenure enjoyed by a Governor-General bore no relation to the form of tenure associated with an established royal dynasty.[197] The Governor-General had no throne to protect and no hereditary lineage to safeguard. In marked contrast to the Monarch, he was a transient, merely temporary figure on the

constitutional stage of a Dominion. He was in a better position to withstand accusations of political partisanship, because his term of office was short and he would soon be replaced by somebody else.

Consequently, it is extremely difficult to draw any firm conclusions about the effect of the 1926 Imperial Conference on this matter. Wheare recognized that the issue was open to debate.[198] In South Africa attention has been focused on the dissolution crisis of 1939. This crisis will be referred to again, after the following heading has also been considered.

(b) Who asks for dissolution : the Prime Minister or the Cabinet?

In the United Kingdom, the King is bound to the advice of his Ministers in almost all forseeable circumstances.[199] Accordingly, it is important to establish which persons are ultimately responsible for offering him the advice to dissolve Parliament. The role of British conventional practice is important from the South African perspective for two reasons. Firstly, the system of government which was established in the Union in 1910, drew heavily upon the contemporary conventional practices which were then operating in the United Kingdom.[200] Secondly, one of the intentions of the 1926 Imperial Conference Resolution was to bring the conventional relationship between the Governor-General and his Ministers into line with the equivalent relationship between the King and his Ministers in the United Kingdom.[201] In the following paragraphs, the role of the British Prime

Minister and his Cabinet will be described vis-a-vis the dissolution of Parliament. Thereafter, the role of the South African Prime Minister and his Union Cabinet will be examined to see if there were many similarities and differences between the operation of convention in both countries. Finally, the 1926 resolution will be examined, to see if a synthesis between the British and the South African conventions was achieved with the adoption of the 1926 resolution.

(i) The British experience

A former Prime Minister of the United Kingdom, Herbert Asquith, has said that all dissolutions are submitted to the Cabinet for ultimate decision.[202] This assertion was true, baring the occasional departure from practice,[203] for all dissolutions of the United Kingdom Parliament up to and including the one in 1910.[204]

The first signs of change came during the First World War.[205] The King had decided to offer the premiership to the leader of the Opposition, Andrew Bonar Law.[206] Foreseeing however, that Bonar Law would make his acceptance of office conditional upon the dissolution of Parliament, the King sought the advice of Lord Haldane.[207] In his reply Lord Haldane asserted:[208]

> '...the only Minister who can properly give advice as to a dissolution of Parliament is the Prime Minister ... the Sovereign cannot entertain any bargain for a dissolution merely with a possible Prime Minister before the latter is fully installed.'

Markesinis believes that Lord Haldane was taking account of the increasing importance of the office of Prime Minister, which was greatly accelerated by the demands of the war.[209] By 1918 the position of the Prime Minister was pre-eminent, in large measure due to Lloyd George's dynamic and indefatigable direction of the country's war effort.[210] Bearing these factors in mind, Markesinis argues that it is easy to understand why the 1918 dissolution openly breached tradition by originating from the Prime Minister himself.[211] There appeared to be no question of consulting the body of the Cabinet about dissolution; the whole matter was left for the Prime Minister to decide for himself.[212] Markesinis has reviewed many subsequent dissolutions of Parliament, and with an exception being made for the dissolution of 1924,[213] he has come to the following conclusion:[214]

> 'That the Prime Minister will usually discuss a possible dissolution with some of his senior and closer colleagues is an historically proven fact, though he is under no constitutional obligation to do this. A fortiore he is not obliged to bring this before the Cabinet for an official decision. But it is also equally certain ... that it is the Prime Minister who finally takes the decision and the responsibility to advise dissolution, even if most prominent members of his administration strongly disagree with him.'

(ii) The South African experience

Lord Buxton was the first Governor-General to grant a dissolution of the South African Parliament.[215] In the following remarks about the conventions relating to dissolution, he drew attention to the important role played by the Prime Minister of the Union:[216]

> 'The Governor-General can dismiss a Ministry, he can refuse a dissolution asked for by his Prime Minister, while he can himself dissolve Parliament against the wishes of his Ministers. But, unless he were absolutely confident that public opinion would fully uphold him in regard to any one of these actions, it would be folly and worse on his part to act against the advice of his Prime Minister.'

The relevant words for present purposes are; 'he can refuse a dissolution asked for by his Prime Minister' and 'it would be folly and worse on his part to act against the advice of his Prime Minister'. These words would appear to be clear-cut. Whenever a dissolution of Parliament was required, the request would be made by the Prime Minister of the Union. Furthermore, a Governor-General who ignored such advice would do so at his own peril. In what capacity, it may be asked, did the Prime Minister give advice? Was he alone in determining the date of a dissolution, or did he consult with the rest of the Cabinet? Was the advice of the Cabinet binding upon him, or could he over-rule it in view of other considerations to which he attached greater weight? Lord Buxton's remarks would not appear to satisfy any of these questions, although at one point he refers to the wishes of 'Ministers' rather than to the wishes or advice of the 'Prime Minister'. No conclusions can be readily drawn.

The pre-eminence of the Prime Minister's wishes first became obvious with the dissolution of 1924. After a series of by-election losses, the Smuts government suffered a humiliating defeat in the normally 'safe' Transvaal constituency of Wakkerstroom.[217] Without consulting the

Cabinet and without sounding the caucus of his party, Smuts decided to resign the premiership and test the feeling of the country in a general election.[218] A few hours after the Transvaal by-election result became know, the Prime Minister entered the House of Assembly and bluntly announced his decision to hold elections.[219] This behaviour created fierce resentment among his supporters, who considered the Prime Minister's decision rather high-handed.[220] Clearly, at the very least, they had expected the Cabinet to be 'consulted', and their reaction is perhaps indicative of a breach with previously established practice.[221] This is a matter however, which would merit further investigation.

(iii) The 1926 Conference

Prior to 1926, the relationship between British and South African practice was difficult to determine, because British conventional practice had been transformed. By 1918, the British Prime Miinister enjoyed far more influence in determining when a dissolution would be advised, than he had enjoyed in 1910. No one is able to say however, whether the influence of the South African Prime Minister had evolved in similar fashion over the same period. It was natural for General Smuts to copy the behaviour of Lloyd George and successive British premiers, when he advised a dissolution in 1924 without consulting his colleagues. The adverse reaction which this caused nevertheless, would suggest that the evolution of South African convention remained a matter of some controversy.

The wording of the 1926 Imperial Conference resolution[222] failed to make matters any clearer. There are two alternative ways of interpreting the resolution however:

1. Firstly, once the resolution was adopted, each Governor-General would have to behave like the King.[223] As the King now dissolved Parliament solely on the advice of the Prime Minister, each Governor-General would have to do the same in the Dominions. As far as the dissolution of the United Kingdom Parliament was concerned, the advice of the British Prime Minister had become pre-eminent. This recent development reflected a somewhat altered relationship between the King and his Ministers,[224] and accordingly, it would have to play an equally important role in the Dominions. The development of modern British convention would have to be reflected in the relationship between each Governor-General and his Dominion Ministers. The personal wishes of the Prime Minister would carry much greater authority than before.

2. Alternatively, it may be suggested that the resolution had left things much as they were prior to 1926. The resolution was not intended to deal with the relationship between a Prime Minister and other members of his Cabinet. Accordingly, uncertainty about whether or not the Prime Minister had to consult the Cabinet about dissolution, and uncertainty about whether or not such advice would be binding on him, was in no way affected by

> the adoption of the resolution. It can be argued that as far as the dissolution of Parliament was concerned, the precise nature of the Prime Minister's influence was of no immediate concern to the assembled statesmen at the Conference. Their primary concern was to promote equality of status between the member states of the Commonwealth.[225] Consequently, the resolution was largely designed to terminate Imperial supervision and control over the various Dominion governments.[226] Apart from this basic intention however, the resolution had suprisingly little impact upon the conventional practices of the Dominions.[227]

Of the two alternative approaches to the interpretation of the 1926 resolution, the second one seems to be the most appropriate. Earlier, it was noted that a South African commentator had said of conventions: 'Hulle reflekteer ook die politieke moraliteit van die stelsel waarbinne hulle opereer.'[228] Naturally, the political 'morality' or the political 'environment' in each of the member states of the Commonwealth differed in certain respects from each other. These differences, could be attributed to several factors, of which the following two examples are perhaps the most important. Firstly, the United Kingdom and the several Dominions each enjoyed a separate or distinct system of government. All of these were based upon the Westminster model of government,[229] but each had its own individual characteristics or idiosyncracies which were not reflected

elsewhere in the Commonwealth.[230] Secondly, the status of the Governor-General could not be equated with the status of the King. The actions of an hereditary Monarch have to be tempered with extreme caution, while those of an appointed, temporary office-holder do not.

These differences explain why the harmonization of convention throughout the Commonwealth would have been so complex. It explains why the harmonization of the 'reserve' power to refuse advice has been all but meaningless.[231] Prior to the 1926 conference, it is questionable whether the relationship between a Prime Minister and his Cabinet colleagues, or between a Prime Minister and the relevant Governor-General, were identical in each of the Dominions. Similarly, it was unlikely that all of them reflected the contemporary position in the United Kingdom.[232] To a considerable extent, these relationships would have been the product of domestic, internal political circumstances.[233] Consequently, there is no reason to suppose why these relationships should have changed automatically as soon as the 1926 resolution was adopted at the conference. The wording of the resolution was simply too vague and general to bear such an interpretation or meaning. Accordingly, it is submitted that those South African conventions which deal with such 'internal' governmental relationships, are not the product of the 1926 Imperial Conference.[234] Similarly, they are not the perfect reflection of the conventions in a foreign, 'mother' country like the United Kingdom.

Therefore, any proper understanding of the South African convention relating to the dissolution of Parliament, requires an investigation into each dissolution of the Union legislature since the first one took place in 1915.[235] It is through the analysis of local dissolution practice, that a valid, local rule can be extrapolated. Hence, constant reference to the practice of dissolution in the United Kingdom or other Commonwealth countries is of limited usefulness to the South African commentator.

Unfortunately, space does not allow for a detailed examination of all the circumstances surrounding each dissolution of the Union Parliament since 1915. A considerable amount of additional research is needed in this area. Some useful pointers may be gleaned however, from the factors involved in the dissolution crisis of 1939.

(c) The 1939 dissolution crisis

There are two closely inter-related aspects to the dissolution crises of 1939. These deal with the following matters:

(i) the extent of the Prime Minister's right to request a dissolution;

(ii) the extent of the Governor-General's right to refuse such a request.

Before these two issues can be explored in detail, it would be useful to give a factual account of the events in South

Africa which led up to the declaration of war against Germany in mid-1939.

Since 1936, the Prime Minister, General Hertzog, had time and again declared that the Union would not take part in a European war unless its interests were at stake.[236] Several months after elections were held in May 1938,[237] the Cabinet adopted an official policy of neutrality over the Czech crisis.[238] The prospect of war loomed nearer in mid-1939 with the crisis over the Polish Corridor, but Hertzog assumed that the policy of neutrality would be continued by his Cabinet.[239] By a co-incidence of timing, a special session of Parliament had been convened for 2nd September 1939.[240] The United Kingdom was on the verge of declaring war, but Hertzog and Smuts both realised that the response of the Union would be determined by a vote taken in Parliament.[241] Clearly, the government had to give some sort of a lead, and lay a coherent policy before the legislature.[242] Accordingly, Hertzog suggested to Smuts that the policy of neutrality be continued.[243] Smuts immediately rejected the idea, and the Cabinet met that same day, 2nd September, to discuss the matter.[244] The United Kingdom declared war against Germany on 3rd September, forcing the South African Cabinet to come to an immediate decision.[245] The Cabinet met on the afternoon of 3rd September 1939, but it appeared to be hopelessly split.[246] Hertzog argued in favour of neutrality in the Polish war, but he failed to convince the majority of his Cabinet colleagues.[247] There was a majority of one in the Cabinet against his proposal to remain neutral,[248] and

therefore it was agreed to lay the whole question before Parliament on the following morning.[249]

On 4th September 1939, the Prime Minister announced in the House of Assembly that the Cabinet was divided on the war issue.[250] A debate then ensued, with Hertzog arguing in favour of neutrality and Smuts countering with support for the war.[251] The debate lasted the whole day, and the vote was taken at 9pm.[252] By a majority of 80 to 67, the amendment moved by General Smuts was carried, and the original motion of the Prime Minister was lost.[253] The rejection of General Hertzog's proposal was tantamount to a motion of no confidence in his leadership.[254] For the first time since Union, a Prime Minister had been defeated in Parliament, and Hertzog immediately asked the Governor-General to dissolve the legislature.[255] The Governor-General, without further consultation, replied on 5th September 1939 in the following words:[256]

> 'I have given careful consideration to the proposal you made to me last evening that I should dissolve Parliament with a view to a general election. There is a general feeling, which I share, that a general election at the present moment would lead to great bitterness and even violence. That situation must, however, be accepted if there is no constitutional alternative.
>
> The present Parliament was elected in May last year. The question of South Africa's participation in a war in which England was involved was at that time clearly before the people, and the policy of the Government, as proclaimed by you and your Ministers, was that the question would be decided by the chosen representatives of the people in Parliament. When war broke out the Government placed the question before Parliament for decision, but was divided on the recommendation that should be made to the House. Two opposing motions were submitted, by you and by General Smuts respectively, and the House decided by a considerable majority to adopt that of General Smuts.

> In the circumstances I cannot see on what grounds I should be justified in rejecting the decision of the House and holding a general election if General Smuts, whose policy obtained the support of the House, is in a position to form a government which will have the support of the House. I have therefore asked him, if possible today, to inform me whether he can form such a government. If he is in a position to do so, I would not feel justified in accepting your proposal to dissolve Parliament.'

Later that same day, General Hertzog resigned the premiership.[257] The Governor-General then called upon General Smuts to form a new Ministry.[258] Smuts had a majority of 17 supporters in the House of Assembly, counting those who had been absent on the crucial day.[259] It has been said however, about the state of opinion in the Union generally:[260]

> '... it would be foolish to assume that he had a majority in the country or that a general election would have returned him to power. If an election or referendum were held today (December 1939) it is more than probable - particularly in the case of a general election - that the majority would have approved the policy of the former Prime Minister.'

The new government, headed by General Smuts, declared war against Germany on 6th September 1939.[261] Whether or not the conventions of the constitution were broken by the Governor-General is hard to establish.[262] In the absence of a detailed analysis of the practice of dissolution in the Union prior to 1939, no firm judgements can be made. Consequently, the observations which follow must not be regarded as the committed views of the writer. They are offered as a strictly limited contribution to a proper analysis of the crisis.

(i) The extent of the Prime Minister's right to request dissolution

Keith, writing in 1940, argued that no tradition existed in any of the Dominions, which entitled one of its Prime Ministers to obtain a dissolution against the will of the majority in his Cabinet.[263] These views have subsequently been echoed in a United Kingdom context by 'The Times' of London. Although the British Prime Minister would normally take the decision and the responsibility to advise a dissolution,[264] 'The Times' argued in 1969 that:[265]

> 'if a Prime Minister, defeated in Cabinet, unable to carry his policy in the party meeting, were to ask for a dissolution for the apparent purpose of unnecessarily involving his party in his own downfall, the Queen would have ample grounds for refusing him and dismissing him provided an alternative leader of the majority party was in sight. Perhaps the best solution if a Prime Minister ever asks for a dubious dissolution is for the Queen to follow the nineteenth century practice of granting dissolution to a Cabinet rather than an individual.'

These views have been echoed by De Smith, who has argued that a refusal would probably be justified and broadly acceptable if a Prime Minister, placed in a minority within his own Cabinet and threatened with repudiation by his parliamentary party, suddenly asked for a dissolution in order to forestall his imminent supersession.[266] He elaborates upon this point even further when he argues:[267]

> 'A fortiore, a Prime Minister who has actually been repudiated by his own party in favour of one of his colleagues can claim no constitutional right at all to demand a dissolution.'

Markesinis has his doubts about the formulation in 'The Times',[268] but he recognizes its applicability to the South

African situation in 1939.[269] He notes that General Hertzog was undeniably repudiated in both the Cabinet and the House of Assembly, and that the majority of his party were prepared to support an alternative administration.[270] The arguments which have been used by De Smith in a British context, would appear to be a tailor-made justification for the actions of the Governor-General during the South African crisis of 1939.[271]

Without doubt, it looked as though Hertzog had lost any vestige of a right to call for the dissolution of Parliament. In one sense, it can be said that there was an 'inter-regnum'. Hertzog's political authority had been rendered nugatory through a combination of circumstances. Once he had been rejected by a majority in both the Cabinet and the House of Assembly, he was effectively 'deposed'. For all intents and purposes, the premiership had now fallen vacant. General Hertzog had been 'killed-off', politically speaking, by his supporters. Political realignment was all too apparent, and it would soon demand the appointment of a new man to take the place of the old premier. Accordingly, the man who had asked Sir Patrick Duncan[272] for a dissolution of Parliament on the evening of September 4th 1939, had already, in truth, been shed of the premiership. General Hertzog was already an ex-Prime Minister in all but name.

(ii) The extent of the Governor-General's right to refuse dissolution

After 1926, the Governor-General's 'reserve' power to refuse a dissolution of Parliament was supposed to be the

same as the King's 'reserve' power to refuse dissolution. It has already been shown however, that this attempted assimilation of conventional practice was filled with difficulties.[273]

In 1939, when Sir Patrick Duncan received a request for dissolution from a defeated General Hertzog, the Governor-General was unable to look to contemporary British practice for any suitable guidance. Equivalent political circumstances had simply not arisen in modern times in the United Kingdom.[274]

In South Africa, Sir Patrick Duncan seems to have been well aware of the fact that an exercise of the 'reserve' power was potentially very unwise. It was perfectly clear from the letter which he sent to General Hertzog on 5th September 1939 that he had absolutely no desire to emulate the political blunders of Lord Byng thirteen years previously in Canada.[275] He did not propose an outright rejection of General Hertzog's advice, such rejection was conditional and depended upon Smuts' ability to construct a new House of Assembly majority. Hence, Sir Patrick Duncan had no intention of refusing a dissolution to one Prime Minister only to find himself forced to grant it to another almost immediately thereafter. The Governor-General's attitude displayed a thorough understanding of constitutional reality, particularly of the conditions which are necessary before an exercise of the 'reserve' powers can be successful. A Government which has enjoyed majority support in the lower House can rarely be replaced by another, alternative government without the

holding of elections.[276] Although the Hertzog government had effectively broken up over the war issue, the Governor-General needed further evidence that Smuts could turn his supporters into a viable, alternative administration.

Ultimately, Sir Patrick Duncan's decision hinged upon the existence of an alternative, viable government.[277] The decision to refuse Hertzog's advice was enormously controversial nevertheless, and many people lost faith in the operation of constitutional government as a result of it.[278] Accordingly, it may be wondered what had induced the Governor-General to exercise a 'reserve' power in the first place. Unless a satisfactory answer can be provided, there will always remain some lingering doubt about the constitutional correctness of the Governor-General's actions.

Two different motives for the rejection of Hertzog's advice may be inferred from Sir Patrick Duncan's letter. Firstly, he was worried that an election over the war issue would lead to great bitterness and violence. In this respect, the Governor-General reflected the attitude of George V during the Home Rule Crisis of 1912-1914.[279] The King had asserted the right to reject the advice of his Ministers, if an impending national disaster, a threatened outbreak of public violence or increasing political tension could be prevented thereby.[280] It is very difficult to pass comment on a motive of this kind. The type of circumstances that characterize a 'national emergency' are fundamentally a question of political judgment. George V did not consider the Irish crisis to be of sufficient dimension to merit his direct,

personal intervention in affairs of state.[281] He maintained a strictly limited view of the role he could play in resolving the Irish problem, notwithstanding rumours of an incipient civil war.[282] Possibly the Governor-General felt that the situation in the Union in 1939 was far more serious, and merited his direct intervention.[283] In the absence of a full, historical analysis of events at that time it is difficult to reach any firm conclusions about the appropriateness of the Governor-General's first motive. It must be noted however, that VerLoren Van Themaat has criticised the actions of Sir Patrick Duncan in the following terms:[284]

> 'Die goewerneur-generaal het sy weiering om die Volksraad te ontbind destyds gemotiveer deur te wys op die onrus wat 'n verkiesing in hierdie verband in die land sal veroorsaak. Waarskynlik is meer onrus veroorsaak deur die bewindsoorname sonder 'n verkiesing van 'n kabinet wat weldra taamlik drasties opgetree het teen andersdenkendes.'

The rejection of advice by the Governor-General can also be attributed to a second motive, which to a certain extent has been misunderstood in the past. Sir Patrick Duncan's letter to General Hertzog implied that Smuts had gained a sufficient 'mandate' to proceed with the war.[285] The letter referred to the policy of the government during the May 1938 elections,[286] when it had been plainly indicated to the electorate that the war issue would be determined by a vote taken in Parliament.[287] The Governor-General inferred that this election promise had been kept, and that Hertzog's request for a fresh mandate from the electorate was therefore

entirely unnecessary and inconsistent with previously stated government policy.[288] There would seem to be a great deal of merit in this argument. The government had not committed itself to a policy of neutrality in the 1938 elections, and it had certainly not ruled out the possibility of war altogether.[289] The Hertzog government had merely promised the electorate that the ultimate decision would be taken by Parliament, and there can be no doubt that this promise had actually been complied with to the full. VerLoren Van Themaat has argued that the mandate for war was not specific enough,[290] but it is hard to see how a more precise mandate could have been obtained in the circumstances.[291] Events in Europe during 1938-1939 were moving extremely rapidly, and ideas about the aims and objectives of the Hitler regime were being hurriedly reassessed.[292] VerLoren Van Themaat has attempted to place far too rigid an interpretation on the theory of the mandate. He fails to take account of ardent critics of the theory.[293] Le May, who is one of these critics, has attacked the whole concept of the mandate with observations like the following:[294]

> 'In the first place, society is not static; and politics is a business of ceaseless accommodation to ceaseless change. The questions which are uppermost at the time of an election may well not be those which are first in importance two or three years later.'

Accordingly, it can be argued that if the mandate theory is to have any credibility at all in relation to the 1939 crisis, a reasonably flexible approach must be adopted towards its interpretation.

Without doubt, the 'war mandate' of 1938 was vague. It is extremely unlikely that voters were thinking of Danzig or the Polish Corridor when Hertzog spoke of possible South African participation in a future war. VerLoren Van Themaat fails to explain however, why a vague mandate must necessarily be an invalid mandate.[295]

Alternatively it could be argued that the mandate theory was irrelevant in the particular circumstances which faced the Union in 1939. Jennings has conceded that the mandate can be waived in periods of emergency.[296] He has even gone so far as to say that it may be the duty of a government to break faith with the electors mandate in certain circumstances.[297] The writer is unable to say whether South Africa faced a national emergency in 1939. All that can be said is that Sir Patrick Duncan believed a serious political crisis was developing in the Union.[298] Whether he was right or wrong is not something about which the writer feels qualified to pass comment. Accordingly, further research is required to determine whether the 1939 crisis constituted one of those rare situations in which no mandate principle can be expected to apply.

The exercise of a 'reserve' power by the Governor-General can be regarded as the practical solution to a difficult problem. It may have fanned the flames of unrest and bitterness, or it may have helped to still them. Unfortunately, the validity of the Governor-General's first motive is not all that easy to assess. On the other hand, the value of the Governor-General's second motive is far easier to

determine. As a result of the 1938 elections, Parliament had been given a mandate to decide the Union's response to any outbreak of war. Events in Europe deteriorated rapidly, and Parliament opted for war on 4th September 1939. In the circumstances, there are no particular reasons why Sir Patrick Duncan should have acceded to the request for a new mandate. Smuts could pursue the new war policy without delay. Elections on the other hand, would have resulted in yet further procrastination. Crucial decisions of the government would have been paralysed for several weeks while the outcome of the poll was being awaited. Chaos and confusion would have reigned in the military, diplomatic and economic spheres of government until the final results of the election battle were known.

(iii) The 1939 dissolution crisis : some conclusions

The 1939 crisis was the product of local political circumstances. Whether the Union should fight a war in conjunction with the United Kingdom represented one of the major bones of contention in South African politics. The controversy destroyed the unity of the government in 1939, and thereby placed the Governor-General in a position for which there was no direct precedent. His response in many ways was a bold one. Whether the King could have behaved with similar confidence in the United Kingdom is a matter for speculation. No similar political crisis has ever arisen in the United Kingdom. A full study of dissolution practice in the Union prior to 1939 is not available. Consequently, it is difficult to place the 1939 crisis in its proper

historical perspective. Certain lessons can be drawn nevertheless from the actions of Sir Patrick Duncan.

Firstly, the 1926 Imperial Conference resolution did not assimilate South African and British convention vis-a-vis the refusal of dissolution. It may well have been the intention of the conference to achieve complete assimilation, but it is doubtful whether this object was successfully attained. The Governor-General of South Africa faced a new and difficult situation in 1939 for which there was no obvious and helpful precedent. His subsequent actions may have been controversial, but sound reasons can be cited in defence of his behaviour. The 1939 crisis was eventually ended by a successful exercise of the Governor-General's 'reserve' power. It cannot be assumed however, that a British Sovereign would have responded to a similar crisis in exactly the same way. The behaviour of a British Monarch would probably be more circumspect, because of his inherent desire to protect the security of his throne.[299]

Secondly, the 1939 crisis placed certain limitations on the conventional rights of the South African Prime Minister. These limitations took account of certain basic political realities to which constitutional convention had to respond. Firstly, the premiership had to exist in substance as well as form. A Prime Minister who lacked the support of his colleagues was not in political reality a Prime Minister at all. Accordingly, a premier who had been repudiated in both the Cabinet and the House of Assembly was effectively shorn of his political authority. He was not thereafter entitled

to an automatic dissolution of the legislature, because the Governor-General was under no constitutional obligation to heed the wishes of a 'nominal' Prime Minister. This convention has not become established in the United Kingdom, because no British Prime Minister has ever sought a dissolution of the legislature after being repudiated in both the Cabinet and the lower House. The reasons for this are to be found in the differing political climates of the two countries. It can be suggested that no British Prime Minister would have asked the Sovereign to dissolve Parliament in order to forestall a growing rebellion among his Cabinet colleagues. Such a request would have involved the Sovereign in factional party warfare[300] - something which all British statesmen would be anxious to avoid.[301]

The political climate in South Africa has been somewhat different, because a similar anxiety did not seem to afflict the minds of South African politicians. Hertzog clearly had few qualms about involving the Governor-General in an explosive party squabble. His immediate political priorities were obviously different, and over-rode the inherent desirability of keeping a Governor-General out of party politics.[302] As a result of this, he placed Sir Patrick Duncan in an exceptionally awkward position. The crisis forced Sir Patrick Duncan to find a local solution to a local problem. The Governor-General's solution placed definite conventional limits on the rights of the South African Prime Minister. Similar restrictions have remained unnecessary in the United Kingdom however, because the political climate of

that country would render them without purpose.

III THE COMMONWEALTH CONVENTIONS

This chapter has dealt with conventions under two headings, one covering the period before 1926, and the other covering the period between 1926 and 1939. These conventions reconciled legal theory with political reality, because they brought the legal framework of government together with the basic features of the Westminster system. The conventions which have been analysed in this chapter were concerned with the 'internal' relationships of government. Some dealt with the relationship between the Governor-General and his Ministers, while others dealt with the relationship between the Cabinet and Parliament.[303] Many of them underpinned the influence of the Prime Minister of the Union, a vital factor without which an understanding of the Westminster system would be thoroughly incomplete.

These conventions have failed to address what may be termed the 'external' relationships of government. It must not be forgotten that in 1910, South Africa was still a colony of the United Kingdom.[304] Legally speaking, the Union was subordinate to the Imperial authorities in London. This meant that the legislative and executive authority of the Union was subordinate to the legislative and executive authority of the United Kingdom.[305] The following legal constraints remained a hindrance to full, responsible government:

(i) reservation and disallowance of legislation of the Union;[306]

(ii) lack of Ministerial access to the King, especially in

relation to prerogative powers;[307]

(iii) accountability of the Governor-General to the Imperial authorities in London;[308]

(iv) the over-riding sovereignty of the United Kingdom Parliament;[309] and

(v) territorial limitations upon the operation of legislation of the Union.[310]

The dichotomy between internal self-government and external, Imperial control was an anomally which came under increasing pressure in the Dominions. In the Union, Hertzog was demanding that the old, inferior status of the Dominions should be brought to an end.[311] By March 1926 he was arguing that the Union ought to be equal in status to the United Kingdom[312] Similar pressure for change was also building up among Irish and Canadian political leaders.[313] Accordingly, when the Imperial Conference was convened in October 1926, the legal restraints which inhibited full Dominion autonomy were high on the conference agenda.[314] Abolition of these legal restraints posed many complex problems for the delegates.[315] Initially at least, they decided to tackle these problems on a conventional rather than on a legal basis.[316] Hence, at the Imperial Conferences of 1926 and 1930, a whole system of intra-Imperial or Commonwealth conventions were adopted by the conference delegates. These rules could not hope to solve all the problems associated with colonial subordination,[317] but they went a long way in satisfying practical political demands.

The Commonwealth Conventions are no longer of any importance to

> reserved for the signification of the King's pleasure,[321] the King was never advised to veto such legislation by his Ministers in the United Kingdom.[322] The ultimate wishes or intentions of the South African government and Parliament were therefore always respected.

Although equality of status was recognized by the Imperial Conference of 1926, the delegates appreciated that a more systematic treatment of reservation was required. They acknowledged that legal form had become inconsistent with the new status of the Dominions,[323] and that a clearer exposition of certain constitutional principles was accordingly necessary.[324] As far as the reservation of Dominion legislation was concerned, the conference proposed at paragraph 3(c) of the Report:[325]

> '... it should be placed on record that, apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognized that it is the right of the Government in each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.'

The adoption of this resolution by the conference meant that Imperial control of Dominion legislation was largely brought to an end.[326] Two key matters were excluded from the ambit of this particular resolution however. Firstly, it excluded any provisions which were embodied in the constitutions of any of the Dominions. Accordingly, as Keith has pointed out,

constitutional change in the Dominions would remain subject to Imperial supervision and control.[327] Secondly, the resolution excluded specific statutes which expressly provided for reservation. Consequently, important legislation, such as Bills relating to merchant shipping affairs, would also remain subject to Imperial control.[328] Being aware of the complexity of the issues which were associated with reservation - especially statutory reservation - the conference decided to recommend the establishment of a Committee of Experts.[329] This committee was charged with undertaking a more thorough investigation of all matters relating to reservation.[330]

The 'committee' met in 1929, and issued the following recommendations in a report entitled 'The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929':[331]

(i) Discretionary reservation by the Governor-General: this power was to be exercised only in accordance with the constitutional practice in each Dominion which governed the exercise of power by the Governor-General.[332] Hence, in South Africa for example, the discretionary power to reserve Bills was to be exercised only on the advice of Ministers of State for the Union.[333]

(ii) Reservation under instructions from the King: these instructions were no longer to be issued on the advice of the Imperial government in London.[334] By implication, the King was to issue instructions to the

Governor-General of a Dominion strictly on the advice of the Dominion Ministry most immediately concerned.[335]

(iii) Reservation and the signification of the King's pleasure: the Report recommended that as regards the signification of the King's pleasure, 'it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom against the views of the Government of the Dominion concerned.'[336] Ultimate control of Dominion legislation therefore, was to be vested in the Dominion Ministry which was primarily involved. Accordingly, the Imperial government could not use the machinery of reservation to frustrate the legislative policy of any of the Dominions.

The committee then went on to deal with the two classes of reservation which had been excluded from the principles laid down at the 1926 conference. As regards these outstanding matters the committee recommended:

(iv) Compulsory reservation under statute: whenever this form of reservation occurred, the King's pleasure was to be expressed in accordance with the wishes of the Dominion Ministry, and not in accordance with the wishes of the Imperial government.[337]

(v) Compulsory reservation under a Dominion constitution: whenever this form of reservation occurred, the King's pleasure was to be expressed in accordance with the

wishes of the Dominion Ministry [338] The Imperial government was therefore surrendering its ultimate control over the nature of constitutional change in the Dominions.[339]

The Imperial Conference of 1930 accepted the recommendations which had been made by the Conference of Experts in 1929.[340] The doctrine or convention that the Imperial government should not exercise its own judgment as to reserved Bills was therefore finally, and conclusively established.[341] Legal form however, remained highly unsatisfactory,[342] because it continued to invite the use of external, Imperial control. Assent to a reserved Bill could only be expressed through an Order-in-Council, and this still required a formal request from a Minister of the Crown in the United Kingdom.[343]

The Conference of Experts had recognized that Dominion governments might seek to remove reservation from their constitutions altogether.[344] In the Union, the Governor-General's discretionary power to reserve Bills was abolished in 1934, along with compulsory reservation under other provisions of the South Africa Act.[345]

Thereafter, reservation under the Royal Instructions of 1909 became an anachronism,[346] and it was finally ended by the issue of new, up-dated Royal Instructions in 1937.[347]

By 1934, other forms of reservation in South Africa had also disappeared. Compulsory reservation under statutes such as the Colonial Courts of Admirality Act 1890, or the

Merchant Shipping Act 1894 were abolished by the Statute of Westminster 1931.[348] Abolition of reservation under these Acts was confirmed again in 1934, with the enactment of the Status of the Union Act by the Parliament of the Union.[349] For almost all intents and purposes therefore, the Commonwealth conventions governing the use of reservation had a remarkably short life in South Africa. They were superceded within four years of the 1930 Imperial Conference by an elaborate combination of new legal rules. These rules had removed the possibility of reservation from almost all possible legislative spheres,[350] rendering the recently established conventional rules almost entirely obsolescent.

(b) The power of disallowance: the conventional restraints

By 1926, disallowance had become virtually obsolete.[351] No Canadian Act had been disallowed since 1873, no New Zealand Act had been disallowed since 1867, and no Australian or South African Act had ever been disallowed.[352] As VerLoren Van Themaat has noted:[353]

> 'Die gebruik was al geruime tyd voor 1926 dat die Britse ministers nie die koning adviseer om wette teen die advies van die ministers van die vrygeweste nietig te verklaar nie.'

The development of this convention was formally acknowledged in paragraph 3(c) of the 1926 Imperial Conference Report.[354] Using words which applied to disallowance as much as they applied to reservation, the paragraph declared:[355]

> '... it is recognized that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.'

The conference decided to refer the whole question of disallowance to a Committee of Experts, which met, deliberated and reported in 1929 as the 'Conference of Experts.'[356] This latter conference confirmed that disallowance was obsolescent. It was stated quite simply in paragraph 23 of the 1929 Report:[357]

> 'The Conference agrees that the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation.'

The recommendations of the 1929 report were confirmed by the Imperial Conference of 1930.[358] The abandonment of disallowance was therefore finally and conclusively established.[359] The government of the Union however, was not content to leave the control of disallowance to rules of convention. The Status of the Union Act 1934 was enacted to abolish the power of disallowance altogether,[360] and thus bring legal theory into line with modern political reality. Commonwealth convention vis-a-vis the power of disallowance therefore enjoyed a remarkably short life-span in the Union. It was superceded by legislation as early as 1934, and it has remained of purely historical interest ever since that date.

(2) Access to the King

In the years between 1926 and 1934, one of the problems which confronted Dominion governments was their lack of direct Ministerial access to the King.

This problem caused particular difficulties with regard to the reservation of Bills and the disallowance of Acts - a matter which has already been alluded to in Chapter II.[361] After 1926,[362] although the Sovereign was still obliged to act on the advice of Ministers of the Crown in the United Kingdom,[363] he was now also expected to act in conformity with the views of the relevant Dominion Ministry.[364] Without the establishment of direct access however, there was no straightforward means of acquainting the King with the views of his Dominion Ministers. In practice, the British government was expected to act as a channel of communication betwen the King and his Ministers in the Dominions,[365] but there was no guarantee that it would always choose to do so.[366] Accordingly, as far as reservatiion and disallowance were concerned, the King's exclusive reliance on advice from his Ministers in the United Kingdom constituted a potentially serious threat to the smooth working of responsible government in the various Dominions. South Africa was in no way excepted from the implications of this difficulty.

In certain respects, lack of direct Ministerial access to the King created even greater problems in the Union than elsewhere in the Commonwealth. This can be asserted because many prerogative powers of the Crown were still in the hands of the King, and few of these had been delegated to the

Governor-General of the Union.[367] Non-delegation meant that a wide variety of executive functions in South Africa required the personal co-operation of the King - an issue which has already been discussed in Chapter II.[368] As the King was obliged to act on the advice of his Ministers in the United Kingdom,[369] there was no guarantee that he would exercise prerogative powers in the way that his Ministers of State for the Union desired.[370] Accordingly, to the extent that prerogative powers were free of South African Ministerial control, it can be argued that executive government in the Union was subordinate to its immediate counterpart in the United Kingdom.[371] The subordination represented by lack of direct access to the King was a considerable threat to the system of responsible government in South Africa. The need for change was clearly apparent, and much was done in this respect through the adoption of convention. Hence, VerLoren Van Themaat has noted:[372]

> 'Gevolglik is die gebruik in 1931 ingestel dat die Unieminister direkte toegang tot die koning het. Die Unieministers het persoonlik dokumente wat die koning moes teken aan hom voorgelê. Gewoonlik was die prosedure dat die goewerneur-generaal gevra is om die brief van die eerste minister, waarin om die koning se goedkeuring vir 'n bepaalde uitvoerende handeling versoek is, aan die koning deur te stuur. As die koning 'n verdere mondelinge verduideliking wou hê, kon dit deur die Unie se hoë kommissaris in die Verenigde Koninkryk gegee word.'

The adoption of a convention of direct access meant that the Union government's dependence on the co-operation of British Ministers was somewhat reduced. It could not be brought entirely to an end however while the seals which

confirmed executive acts of the King were still in the hands of Ministers of the Crown in the United Kingdom.[373] The complete removal of all possible British influence therefore required the creation of a new set of South African based seals. Another outstanding problem connected with lack of access was the question of Ministerial co-signature. The King's sign manual was usually confirmed by the co-signature of one of his Ministers in the United Kingdom.[374] Unless this procedure could be eliminated, direct access would always require a modicum of British co-operation as regards the Union's internal affairs.[375]

The South African Parliament took both these outstanding matters in hand with the enactment of the Royal Executive Functions and Seals Act 1934.[376] By this stage, the power of reservation and disallowance had already been abolished.[377] Accordingly, the Royal Executive Functions and Seals Act is important in this context only in relation to the King's prerogative powers.

Firstly, as regards the use of seals, the Act made provision for a Royal Great Seal of the Union and a Signet Seal.[378] Both of these were to be kept by the Prime Minister of the Union.[379] The Act established that the King's sign manual was to be confirmed by the Great Seal of the Union on all royal proclamations.[380] The use of seals on other public instruments bearing the King's sign manual was to be determined by subsequent proclamation.[381] The enactment of these provisions ensured that the use of British seals could be brought to an end. Secondly, the Act established that the

King's sign manual was to be confirmed by the co-signature of a Minister of State for the Union.[382] The need for British Ministerial co-signature was accordingly brought to an end.[383] Consequently, although direct access to the King was established by convention in 1931, it was the 1934 Act which made it a meaningful procedure from the South African point of view. What is more, the 1934 Act dealt with the one outstanding problem which convention was unable to resolve. The King continued to be physically inaccessible, because he was separated from his Ministers by the length of an entire continent. Accordingly, it was inevitable that there would be some awkward delays in the transaction of certain government business.[384] The Royal Executive Functions and Seals Act anticipated this particular difficulty however, by circumventing the need for access altogether. The Act established that the King's sign manual could be dispensed with completely, and substituted with the signature of the Governor-General of the Union.[385]

In this way, prerogative powers could be exercised without the personal co-operation of the King. Formal control of such powers in other words was finally transferred to the government of the Union.[386]

A purely conventional approach to the problem of access was therefore not adopted. The conventional rule of 1931 was supplemented and largely superceded by statutory legal rules in 1934. Both types of rule lost their significance however when South Africa became a republic and left the Commonwealth in 1961. The establishment of a republic meant that the role

of the Sovereign in government was entirely eliminated.[387] Access to the King in other words became utterly redundant.

(3) The role of the Governor-General : conventional reform

The dual nature of the Governor-General's functions has already been discussed in Chapter II.[388] Each Governor-General was a local representative of the King. Each of them was also an Imperial appointee, who was accountable for his actions to Ministers of the Crown in the United Kingdom. The twin roles which had to be played by Governors-General was the cause of increasing dissatisfaction among Dominion governments. It was inconsistent with the concept of equality of status, and it remained a constant threat to the system of responsible government. The Imperial Conference of 1926 gave the matter considerable thought, and it finally resolved to adopt the following words at paragraph 3(b) of its Report:[389]

> 'In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of the Government.'

Whether or not a Governor-General could be equated exactly with the King has already been discussed in detail in an earlier part of this chapter.[390] At this stage the primary intention is to point out however, that a Governor-General was no longer expected to act as an agent of the Imperial

authorities in London. He was expected to act solely as a representative of the King, or in VerLoren Van Themaat's own words:[391]

> 'Die goewerneur-generaal is die verteenwoordiger van die koning en nie van die Engelse regering nie. Die goewerneur-generaal handel dus volgens die advies van die regering van die betrokke vrygewes.'

The change in the status of the Governor-General had important consequences in two closely related areas. Firstly, it led to a change in the method of appointing Governors-General, and secondly, it led to the establishment of a separate High Commissioner for South Africa. The background to these changes will now be examined.

(a) Appointment of the Governor-General

Originally, no British Minister would have thought of consulting the wishes of any colony regarding the proposed appointment of a Governor.[392] The Secretary of State for the Colonies, with the approval of the British Prime Minister, recommended for the sanction of the Sovereign suitable persons to fill the office of Governor.[393] From 1882 to 1889 various colonies agitated against the existing procedure.[394] In 1889 it was finally agreed that colonies should be informally consulted about the appointment of their Governors, and that they should enjoy an informal right to object to the appointment of any particular candidate.[395] Accordingly, from 1889 onwards, colonies and Dominions were consulted about the appointment of Governors and Governors-General, but sole responsibility remained in the hands of the

Imperial government in London.[396]

After the adoption of paragraph 3(c) of the 1926 report, Dominion governments were expected to advise the Crown in all matters relating to their own particular affairs.[397] Consequently, it was assumed that Governors-General would be appointed by the King on the advice of the Dominion government most immediately concerned.[398] Any lingering doubts about the correct procedure were dispelled by the Imperial Conference of 1930, because in the words of VerLoren Van Themaat:[399]

> 'By die rykskonferensie van 1930 is 'n uitdruklike besluit geneem dat die koning op advies van sy vrygewestelike ministers, as die partye wat belang by die saak het, die goewerneur-generaal aanstel, nadat eers 'n informele raadpleging met die koning was.'

The combined effects of the 1926 and 1930 Imperial Conferences were not apparent in South Africa until 3rd December 1930. On that day the Earl of Clarendon was appointed Governor-General of the Union - the first such appointment for more than six years.[400] The Union government was solely responsible for the decision.[401] It was the Prime Minister of the Union who made the necessary recommendation to the King, and it was the Prime Minister of the Union who counter-signed the Commission of appointment.[402] A similar procedure was followed thereafter in respect of all subsequent Governors-General of South Africa.[403] Once the change in the status of the Governor-General was established, it was only a matter of time before a South African national

would be chosen to fill the position. The first such appointment occurred in 1936, when Sir Patrick Duncan became the Governor-General of the Union.[404] All subsequent Governors-General have also been South African,[405] and a convention soon developed which made local citizenship a prerequisite for appointment.[406]

(b) The High Commissioner

The origin of the office of High Commissioner for South Africa goes back to 1846.[407] In that year, the Governor of the Cape of Good Hope was appointed 'Her Majesty's high commissioner at the Cape of Good Hope for certain purposes'.[408] The primary duty of the Cape's High Commissioner was to control relations between the colony and neighbouring Black tribes - subject to any directions which he might receive from the Imperial authorities in London.[409] Among his other duties was an obligation to prevent attacks upon the colony by these adjoining Black tribes, and to endeavour to place such tribesmen under a settled form of government.[410] Eventually, the High Commissioner became Governor of Basutoland, while he also supervised the affairs of Swaziland and the Bechuanaland Protectorate.[411] In addition, he came to exercise control over the affairs of Southern Rhodesia, until the grant of responsible government to that territory on 1st October 1923.[412] Between 1910 and 1930, the office of High Commissioner was vested in successive Governors-General of the Union.[413] They held this position under separate commissions, however.[414]

The combination of offices in one person became increasingly untenable, especially after the Imperial Conference of 1926.[415] The termination of the Governor-General's accountability to the Imperial authorities in London meant that it was no longer logical to make him accountable in his capacity as High Commissioner for South Africa.[416] Accordingly, the decision was taken to separate the office of Governor-General from the office of High Commissioner.[417] The formal split took effect in 1930, after the retirement of the Earl of Athlone as Governor-General of the Union.[418] Consequently, from 1930 onwards, there existed a separate High Commissioner for South Africa. He was the chief government official in the three 'High Commission Territories'.[419] He also served as a link between the British government and South Africa.[420] The High Commissioner thus became the United Kingdom's main diplomatic representative in the Union.

(c) Legal Consequences

The conventional rules which regulated the position of the Governor-General in South Africa were soon thereafter to be supplemented by statute. The Status of the Union Act of 1934 s 4(1) declared:[421]

> 'The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative'.

The possibility that the Governor-General would breach

convention and act on the advice of Ministers in the United Kingdom therefore receded. Any such behaviour on the part of the Governor-General would have been tantamount to a violation of the law.[422] S 4(3) of the Status of the Union Act excluded certain functions of the Governor-General from the ambit of the new statutory rule.[423] To this extent only, the convention which had been established by resolution of the 1926 Imperial Conference remained of importance to this country. Any lingering doubts that the Governor-General might have exercised some of his powers on the advice of British Ministers were dispelled by 1937, however. In that year, new Letters Patent and Royal Instructions were issued to the Governor-General to replace the outdated original versions which had survived since 1909.[424] The new Letters Patent ended the authority of the Privy Council or Ministers of the United Kingdom government to give instructions to the Governor-General of the Union.[425] Any residual fears therefore, that the Governor-General might appoint and dismiss Ministers on the advice of the British government, or that he might summon, prorogue or dissolve Parliament on British Ministerial advice, were totally dispelled.[426]

(4) The sovereignty of the Imperial Parliament

The sovereignty of the Imperial Parliament has already been discussed in Chapter II.[427] The Parliament of the United Kingdom was 'Imperial' because it had full authority to legislate in all colonies of the British Crown.[428] The

Parliament of the United Kingdom could also be described as 'sovereign' by virtue of the doctrine of 'repugnancy'.[429] These two matters must be examined separately.

(a) The legislative authority of the Imperial Parliament

The legal power of the United Kingdom Parliament to legislate for the colonies became subject to a convention of self-restraint. It may be asserted that such a convention had already been accepted before the Imperial Conference of 1926 agreed to the idea of 'equality of status'.[430] Open acknowledgment of the existence of this convention, however, had to wait until 1929. In that year, the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation declared in paragraph 54:[431]

> 'It would be in accord with the established constitutional position of all members of the Commonwealth in relation to one another that no law hereafter made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion'.

In the Australian courts, it was decided in Copyright Owners Reproduction Society Ltd v EMI (Australia) (Pty) Ltd that the convention of legislative self-restraint undoubtedly existed in 1928.[432] It needs to be emphasized, however, that the adoption of a conventional restraint made no difference to the continuing legal authority of the British Parliament to legislate for the colonies.[433] VerLoren Van Themaat has argued that the British government wished to retain a residual legislative authority over the Dominions.[434] This left room for the exercise of a 'reserve

power' by the United Kingdom Parliament if a serious crisis ever developed in one of the Dominions of the Crown.[435] An opportunity to clear up the confusion about the existence and extent of any British 'reserve power' was not seized upon at the Imperial Conference of 1930.[436] The convention did not seem to survive for long, however, because it was superceded by statute in 1931. The Statute of Westminster, an enactment of the Imperial Parliament, declared in s 4:[437]

> 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of the Dominion unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof'.

It can be argued that this statutory provision did not entirely replace the importance of the conventional rule. Wheare has argued:[438]

> 'The enacted provision does not go so far in controlling the power of the parliament of the United Kingdom as the convention does. The convention lays down a rule to determine when the power may be exercised; the law lays down a rule to determine when the power has or may be deemed to have been exercised. If the Parliament of the United Kingdom passed a law extending to a Dominion but inserted in the law a declaration that the request and consent of the Dominion had been obtained, it would have broken the convention, but it would not have broken the legal rule. The convention and the legal rule work together and neither is completely effective without the other'.

There is another ground on which it could be argued that the convention remained important. In reality, s 4 of the Statute of Westminster was only a self-imposed limitation, the voluntary nature of which could be attributed to the

doctrine of parliamentary sovereignty.[439] As the British Parliament has always been unable to bind any of its successors,[440] there has never been a legal obstacle to stop it from abolishing the Statute of Westminster altogether. The only thing which seems to have inhibited this possibility is the continuing vitality of the conventional rule. Recognition of this state of affairs was hinted at by Lord Sankey in the case of British Coal Corporation v The King.[441] Lord Sankey noted:[442]

> 'It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains unimpaired; indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities'.

Dissatisfaction with this state of affairs may have induced the South African Parliament to enact s 2 of the Status of the Union Act of 1934.[443] The provision declared:

> 'The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom ... passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union'.

S 3 of the Status of the Union Act incorporated the Statute of Westminster into South African law as a South African statute.[444] The combined effect of these two provisions, it may be argued, would have protected the Union from the consequences of any British attempt to repeal the

1931 statute.[445] Although s 2 of the Status of the Union Act was vulnerable to legal attack,[446] there can be little doubt that South African courts regard the British Parliament as having irrevocably abdicated its power to legislate over South Africa.[447] Stratford ACJ, for example, declared in the case of Ndlwana v Hofmeyr:[448]

> 'Mr Buchanan ... questioned the sovereignty of the Union Parliament. He said that the Statute of Westminster by removing the fetters upon the legislative power of the Union Parliament did not confer sovereignty; that the power conferred rested upon a Statute of Great Britain and could therefore be revoked by a similar statute. We cannot take this argument seriously. Freedom once conferred cannot be revoked'.

Centlivres CJ echoed these sentiments in Harris v Minister of the Interior when he said:[449]

> '... the only legislature which is competent to pass laws binding in the Union is the Union legislature'.

Accordingly, it can be said that there has been judicial recognition of a political fact - involving a revolutionary break with past subordination.[450] It can be argued as far as South African courts are concerned that the legislative independence of this country's Parliament rests on statute. The important role of the Commonwealth conventions has been eliminated.

(b) The doctrine of repugnancy

The sovereignty of the Imperial Parliament gave rise to another inequality - the doctrine of repugnancy.[451] Dominion legislatures enjoyed no general power to repeal or

amend any past or future Act of the United Kingdom Parliament which extended to a Dominion as part of the law of that Dominion.[452] The doctrine of repugnancy can be traced back to the earliest stages of British colonial development,[453] but in its more modern form it was to be found in s 2 of the Colonial Laws Validity Act of 1865.[454]

The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation in 1929 recognized the fact that legislation would be necessary to end the inequalities occasioned by the doctrine.[455] A constitutional convention could not be developed to terminate the practical effect of repugnancy. This may be asserted because no conventional rule could amend or repeal a statute, and no conventional rule could alter pre-existing common law.[456] The necessary legislation was finally enacted by the Imperial Parliament in terms of s 2 of the Statute of Westminster.[457] Conventions, therefore, had no role to play in the development of Dominion autonomy in this particular respect.

(5) Legislation with extra-territorial effect : Dominion incapacity

The extra-territorial limitation upon the operation of Dominion legislation has already been highlighted in Chapter II.[458] The existence of this limitation was inconsistent with the whole notion of equality of status. The Imperial Conference of 1926 recognized that the problems involved needed further investigation.[459] In 1929 the Report of the Conference on the Operation of Dominion Legislation and

Merchant Shipping Legislation recommended the enactment of legislation to end the restriction on Dominion legislative competence.[460] They noted that the law relating to the restriction was so full of obscurity that no other course of action was feasible.[461] It can also be pointed out that no convention of 'self-restraint' could have developed in these circumstances because no court of law would have been competent to enforce such a rule.[462] Accordingly, s 3 of the Statute of Westminster was enacted to make it perfectly clear that Dominion Parliaments were to enjoy full power to make laws with extra-territorial effect.[463] Convention, therefore, had no role to play in the removal of this legal restriction on the competence of Dominion legislatures.

(6) The Commonwealth Conventions : conclusions

This brief description of some of the more important conventional rules of the Commonwealth has helped to demonstrate that these rules were vital to the full development of a Westminster system in South Africa.

These Commonwealth rules are no longer of any significance to this country, because South Africa left the Commonwealth in 1961. Many of the conventional rules had long been obsolescent, however, because many of them had been superceded by statutory provisions in 1931 and 1934.

CHAPTER IV

THE SCOPE OF CONVENTIONS

1. INTRODUCTION

Chapters II and III have demonstrated that a proper understanding of the constitution becomes impossible without an appreciation of the role played by conventional rules. In the chapters which follow, therefore, particular attention will be paid to the basic character of such rules. The purpose of the present chapter, however, is to explain the scope of conventional rules. Their full significance in relation to the constitution of the country will only be understood when their field of influence has been highlighted.

II. THE SCOPE OF CONVENTIONS : DICEY'S VIEW

Any study of the scope of constitutional conventions must refer, in the first instance at least, to the views of Dicey. His definition of the term 'Constitutional Law' has demonstrated that conventional rules are intimately associated with the regulation of powers of government. Dicey observed:[1]

> 'Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. Hence it includes (among other things) all rules which define the members of the sovereign power, all the rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority... Observe the use of the word "rules", not "laws". This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character. The one set of rules are in the strictest sense "laws", since they are rules which (whether written or unwritten, whether enacted by statute or derived from the

> mass of custom, tradition or judge-made maxims known as the common law) are enforced by the courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction be called collectively "the law of the constitution."
>
> The other set of rules consist of conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution", or constitutional morality.'

The definition of constitutional law which was provided by Dicey turned, therefore, upon a distinction between legal and non-legal rules. According to Dicey, however, the non-legal rules of the constitution - or constitional conventions - suffered from one apparent difficulty. He said:[2]

> 'They are multifarious, differing as it might at first sight appear, from each other not only in importance but in general character and scope.'

Dicey believed that the one common factor which can be attributed to conventions is that all, or most of them are rules for determining the mode in which the discretionary powers of the Crown - or of Ministers as servants of the Crown - ought to be exercised.[3] Dicey went on to explain that the discretionary powers of the Crown include every kind of action which can be legally taken by the Crown, or by its servants, without the necessity for new statutory authority being granted by Parliament.[4] As every lawful act of the Crown is derived either from statute or prerogative powers,[5] Dicey was asserting that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is

to be exercised.[6]

He demonstrated the relationship between conventions and the prerogative with examples. Thus, he argued that the convention that the Cabinet must retire from office when outvoted on a vital question may be formulated to read: the Prerogative of the Crown to dismiss its servants at the will of the Queen must be exercised in accordance with the wish of the Houses of Parliament.[7] Using another of his examples, the convention that Parliament must meet at least once a year may be formulated to assert: the Crown's legal right or prerogative to call Parliament together at the Queen's pleasure must be so exercised that Parliament meets once a year.[8]

In view of the fact that prerogative powers cover a wide variety of potential government functions,[9] it can be said that conventions have a role to play in personal decisions of the Sovereign, actions taken by the Sovereign with the advice of Ministers, and actions of the Ministry in the Sovereign's name.[10]

III THE CONSTITUTION : MODERN PERSPECTIVES

Although Dicey's description of the content of constitutional law was a reflection of his perceptions of nineteenth century British society, his ideas continue to influence more recent writers who have enjoyed a broader perspective.

Wheare is one writer whose ideas seemed to echo those of Dicey. He explained what is meant by the term 'Constitution' in the following manner:[11]

> 'The word "constitution" is commonly used in at least two senses in any ordinary discussion of political affairs.

> First of all it is used to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government. These rules are partly legal, in the sense that courts of law will recognize and apply them, and partly non-legal or extra-legal, taking the form of usages, understandings, customs or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called. In most countries of the world the system of government is composed of this mixture of legal and non-legal rules and it is possible to speak of this collection of rules as "the constitution." '

Wheare has noted that the term 'constitution' may be used in a second, narrower sense, however. He said:[12]

> 'It is used to describe not the whole collection of rules, legal and non-legal, but rather a selection of them which has usually been embodied in one document or in a few closely related documents. What is more, this selection is almost invariably a selection of legal rules only. "The Constitution", then, for most countries in the world, is a selection of the legal rules which govern the government of that country and which have been embodied in a document.'

The first, wider meaning of the term 'constitution', and the second, narrower meaning of the term inter-act and complement each other.[13] As Wade and Phillips have observed in language which could be applied to the Union constitution of South Africa as much as to any other constitution:[14]

> 'The wider sense of the word constitution includes a constitution in the narrower sense. In countires like Canada, the U S A and the states of Western Europe, the written constitution occupies the primary place amongst the 'assemblage of laws, institutions and customs' which make up the constitution in the wider sense. However, undue emphasis can be placed on the possession of a written constitution. No written document alone can ensure the smooth working of a system of government... Around a written constitution will evolve a wide variety of customary rules and practices which attune the operation of the constitution to changing conditions...'

The scope of conventions would therefore seem to be intimately

connected with the practical workings of government. Although Dicey's ideas have had a considerable amount of influence on later writers, this does not mean to say that his description of the scope of conventions has not been subjected to criticism. Dicey's assertion that conventions are largely concerned with the exercise of prerogative powers has been vigorously disputed by Jennings. Consequently, attention must now turn to Jennings' description of the scope of convention.

IV. THE SCOPE OF CONVENTIONS : JENNINGS' VIEWS

Jennings had no dispute with Dicey about the basic role of conventions. After all, it was Jennings who observed that 'constitutional conventions clothe the dry bones of the law, making the legal constitution work and keeping it in touch with the growth of ideas.'[15] He disagreed, however, with Dicey's treatment of the scope of conventions. His criticism was based on three, related grounds:[16]

(1) The Royal Prerogative

Jennings argued that conventions are concerned with far more than the exercise of prerogative powers.[17] He believed that conventions 'provide for the whole working of the complicated governmental machine.'[18] Jennings' criticism of Dicey was based on the assertion that the latter had failed to comprehend the importance of the Cabinet.[19] He argued that the Cabinet is concerned with matters which range far beyond the traditional confines of the royal prerogative, and that the Cabinet has developed a life and an authority

of its own.[20] Nowadays, government is largely concerned with statutory functions which have been entrusted to Ministers,[21] rather than the exercise of common law prerogative powers of the Crown. Jennings noted that governments now enjoy considerable flexibility as to the course of action they wish to pursue.[22] A government which lacks sufficient common law or statutory authority to pursue a particular course of action may always seek the necessary authority from Parliament in the form of legislation.[23]

Jennings' criticism of Dicey in this respect has to carry considerable weight. Even Munro, who has a tendency to disagree with Jennings on many issues relating to conventional rules has accepted that Dicey's analysis of the scope of conventions was distorted.[24] The weakness of Dicey's approach to the scope of conventions has been summed up by Wade in words which demonstrate the strength of Jennings' influence:[25]

> 'Conventions relating to internal government go much further than the examples which were chosen by Dicey from the exercise of the royal prerogative and the relationship between the two Houses of Parliament. They nowadays provide for the working of the whole complicated governmental machine. A Cabinet in deciding upon policy will require to know whether it already has the power in law to take the action which it proposes. It is certainly not limited to exercising those prerogative powers of the Sovereign which are entrusted to it by convention. Through its command of a majority in the House of Commons it is normally in a position to take legal powers if they do not already exist'.

(2) Constitutional Conventions and the British Commonwealth

Jennings has highlighted the impact of conventions in an area of government which Dicey could not have anticipated.

It was observed by Jennings that conventions have been crucial to the development of the British Commonwealth in at least two respects.[26] Firstly, they contributed to the establishment of internal self-government for the older Dominions of the British Crown.[27] This has already been demonstrated in a South African context in chapter III.[28] Secondly, conventions laid the foundations upon which inter-governmental relationships were built throughout the whole Commonwealth of Nations.[29]

(3) The Powers and Privileges of Parliament

Dicey conceded that some of the conventions of the British constitution have no reference to the exercise of royal prerogative powers.[30] He noted that some conventions are rules which determine the way in which one or other or both Houses of Parliament are supposed to exercise their discretionary powers or privileges.[31] Dicey has been unable to escape criticism from Jennings, even in this context however. Most of the examples of such conventions which Dicey offered have become entirely obsolete.[32] Many others which he could have mentioned were entirely overlooked.[33] In this context, Jennings observed:[34]

> 'But there are many more conventions regulating Parliamentary procedure than those which Dicey mentioned. To a large extent these rules are to be found in "the law and custom of Parliament" ...'

He also noted that there are many other conventions subsisting in the 'informal' custom of Parliament.[35] These are crucial to the survival of the British Parliament as a

living institution because most of these conventions relate to the operation of the party system.[36] In this context Jennings said:[37]

> 'There is nothing except convention which restrains the Government from appointing a committee consisting only of members of the Government party. Similarly, it is convention only which determines that a speech from the Government side shall be followed by a speech from the Opposition. Indeed, the whole idea of "Her Majesty's Opposition" is a product of convention.'

(4) Jennings' view of the scope of conventions : a conclusion

Jennings has undoubtedly shown that there were weaknesses in Dicey's analysis of the scope of convention. Blame cannot be placed entirely on Dicey's shoulders, however. The importance of the nascent Commonwealth conventions, for example, could not have been appreciated in the era in which Dicey was writing.[38] Munro has come to the defence of Dicey's oversights, moreover, in the following terms:[39]

> 'This distortion is perhaps excusable, for Dicey has described what is certainly the most important class of conventions, and what was no doubt the most conspicuous, as the means whereby effective power had been transferred from a sovereign to ministers responsible to Parliament.'

V. THE SCOPE OF CONVENTIONS : MARSHALL'S VIEW

Marshall is also critical of Dicey's perception of the scope of conventions. Although Marshall has conceded that conventions provide the framework of Cabinet government and political accountability, he argues that conventions spread more widely than Dicey suggests.[40] Besides the conventional rules that govern the powers of the Crown, Marshall says that there are many

other constitutional relationships between governmental persons or institutions which illustrate the existence of conventional rules.[41] Among these relationships he notes:[42]

(a) Relations between the Cabinet and the Prime Minister;

(b) Relations between the Government as a whole and Parliament;

(c) Relations between the two Houses of Parliament;

(d) Relations between Ministers and Civil Servants;

(e) Relations between Ministers and the machinery of justice; and

(f) Relations between the United Kingdom and the member countries of the Commonwealth.

It is doubtful whether the full scope of conventions will ever be authoritatively settled. One of the reasons for this state of affairs may be attributed to the vagueness of many conventional rules.[43] The question of vagueness will be explored further in Chapter V.[44]

VI. THE SCOPE OF CONVENTIONS IN SOUTH AFRICA

One of the difficulties with academic debate about the scope of convention is that discussion always seems to take place within the context of the British system of government. The full scope of conventional rules in South Africa has not been the subject of a systematic analysis. A comprehensive examination of all possible conventional rules in this country would be of invaluable benefit to South Africa's constitutional lawyers. Unfortunately such an ambitious project is well beyond the ambit of this present work.

It can be assumed to a considerable extent, nevertheless, that the scope of conventions in South Africa has mirrored the equivalent extent of such rules in the United Kingdom. The basis of this assumption is the shared constitutional heritage of the two countries. Many of the conventions which give expression to the Westminster form of government have been as much a part of South Africa's constitutional tradition as they remain a part of the United Kingdom's constitutional heritage.[45] As VerLoren Van Themaat has commented:[46]

> 'Saam met die parlementêre stelsel, wat eers in die afsonderlike kolonies in 'n meerdere of mindere mate ingevoer is en toe met die Zuid-Afrika Wet 1909 ten opsigte van die hele Unie ingevoer is, het 'n aantal gebruike en regsreëls uit die Engelse staatreg, hetsy uitdruklik hetsy stilswyend, deel van ons reg geword[47] (vir sover hulle nie alreeds deel van die reg van die kolonies was nie). Hierdie reëls en gebruike is wel mettertyd gewysig, maar 'n groot gedeelte daarvan geld nog in die Republiek.'

South Africa, of course, has never complied entirely with all the usual requirements for a Westminster form of government.[48] This has thrown the existence of some constitutional conventions in this country into doubt.[49] On the whole, however, it may be asserted for present purposes, that the scope of conventions in South Africa includes all those conventional rules which have provided the framework for Cabinet government. It is not being asserted that the content of conventional rules are exactly the same in both South Africa and the United Kingdom. All that is being suggested is that the scope of these rules is roughly similar to the extent that they have determined the operation of the Westminster system in this country.

CHAPTER V

THE CHARACTER OF CONVENTIONS

I THE OBLIGATORY CHARACTER OF CONSTITUTIONAL CONVENTIONS

(1) 'Rules' and 'habits or practices'

The definition of constitutional law which has been formulated by Dicey is founded upon a distinction between legal rules and non-legal rules.[1] According to Dicey's theory, legal rules are enforced by the courts.[2] Non-legal rules on the other hand are not enforced by the courts.[3]

The differences between legal rules and non-legal rules have also been examined by Hart. The basis of his distinctions will be explored in this paragraph, using the term 'A^1' to describe legal rules, and 'A^2' to describe non-legal rules. As far as 'A^1' are concerned, one of their salient characteristics is that deviation therefrom will be met by a hostile reaction.[4] The consequences of breach are definite and officially organized, taking the form of punishment from officials.[5] As far as 'A^2' are concerned, breach or deviation therefrom will also lead to a hostile reaction.[6] Deviation from 'A^2' is regarded as a lapse or a fault open to criticism, and a threatened deviation will be met by pressure for conformity.[7] Unlike the reaction to breach of 'A^1' however, the reaction to breach of 'A^2' will be less definite or organized in character.[8] What is more, the forms of criticism and pressure will vary, depending upon what 'A^2' rules are involved.[9]

Hart goes on to contrast these 'A^1' and 'A^2' rules from

what may be described as 'B'.[10] The latter consists of those habits, usages or practices of a group which may be described simply in terms of convergent behaviour.[11] 'B' are not re-enforced by pressure for conformity, and no proof or punishment will spring from the non-observance thereof.[12] Accordingly, the mere existence of convergent behaviour between the members of a certain group will not automatically give rise to a sense of obligation. Members are not 'pushed' into behaving in only one particular way.

Using Dicey's formulation, it can be said that the non-legal rules of the constitution are made up of constitutional conventions.[13] Accordingly, it is possible to distinguish constitutional conventions on the one hand, from those habits, usages or practices which amount to convergent behaviour on the other. It can be asserted that constitutional conventions are 'rules', and as such they are prescriptive or obligatory in character.[14] Habits, usages and practices are not 'rules' however, and hence they cannot be described in any similar way.[15]

(2) Conventions: the extent of obedience

It should not be assumed too readily that conventions are obligatory, because this may lead to certain difficulties. Many writers accept that conventions are binding in character,[16] but only one of them would argue that this is a fundamental prerequisite.[17] The confusion is exemplified by Dicey. At one and the same time he has asserted that conventions are obligatory, while adding a proviso that the

invariableness of obedience is itself more or less fictitious.[18] The fiction of obedience continues to be maintained nevertheless, because as Dicey has remarked:[19]

> 'The uncertain character of the deference paid to the conventions of the constitution is concealed under the current phraseology, which treats the successful violation of a constitutional rule as proof that the maxim was not in reality part of the constitution.'

(a) The key conventions

There can be no doubt however that certain key conventions are rigorously obeyed.[20] Dicey has noticed for example that the British Parliament is summoned year by year, as though its annual meeting were provided for in some law of nature.[21] Conventions such as these help to secure the fundamental principle of the British constitution[22] - the substance of which Dicey has explained as follows:[23]

> 'Some few of the conventions of the constitution are rigorously obeyed ... and ... though particular understandings are of uncertain obligation, neither the Crown nor any servant of the Crown ever refuses obedience to the grand principle which ... underlies all the conventional precepts of the constitution, namely, that government must be carried on in accordance with the will of the House of Commons, and ultimately with the will of the nation as expressed through that House.'

Dicey has argued that any attempt to violate the key conventions would inevitably lead to a breach of the law.[24] Hence - to use one of his favourite examples again - the convention which requires annual meetings of Parliament could not be broken without encountering major legal obstacles.[25] The levying of taxes and the appropriation of

government revenues both require parliamentary authorisation on a strictly annual basis.[26] Similar parliamentary authorisation is also regularly required in order to sustain the statutory validity of the British armed forces.[27] Accordingly, Parliament's failure to meet within the times prescribed by convention would soon represent a threat to orderly and peaceful government.[28] The levying of taxes would ultimately become illegal, as would continued government spending of any of its revenues.[29] The maintenance of the armed forces would also be brought into question, especially if Parliament failed to meet for more than five years.[30] Consequently, a government which seeks to avoid illegal or revolutionary action cannot choose to ignore important conventional rules.[31] It is being argued, in other words, that a variety of important constitutional conventions will always be obeyed.

A more detailed examination of this subject will be made in a South African context in the course of Chapter VII.[32]

(b) The vague conventions

Dicey has conceded that a class of more vague conventions are also in existence, and that these receive only a varying amount of obedience. Of these vague conventions he has said:[33]

> 'Other constitutional maxims stand in a very different position. Their maintenance up to a certain point tends to secure the supremacy of Parliament, but they are themselves vague, and no one can say to what extent the will of Parliament or the nation requires their rigid observance; they therefore obtain only a varying and indefinite amount of obedience.'

The vagueness of certain conventions may be attributed to the fact that many of them are framed as general rules whose precise limits have not been fully explored.[34] Vagueness may also arise for other reasons however, such as whenever two conventional rules come into potential conflict with each other.[35] Consistent obedience to vague conventions is therefore not without an element of difficulty. Dicey has highlighted the extent of this problem with particular reference to one conventional rule.[36] He has referred to the rule which requires a Ministry to resign if it loses the confidence of the House of Commons.[37] This rule, he has said, should always be obeyed, although it may be difficult to establish when parliamentary confidence has been indisputably withdrawn.[38]

This sort of problem is not confined to rules which are only found in conventional form. Legal rules may also suffer from the penumbra of ambiguity.[39] 'Converting' a convention into a legal rule will not automatically solve any difficulties associated with vagueness. As De Smith has said, the texture of the 'converted' rule may still be too open, and its content too indeterminate for legal adjudication to be appropriate.[40] Accordingly, the rules which govern the resignation of an unpopular Ministry are not bound to be more precise when they are placed in legal form. Confirmation of this latter assertion may be found in a major Nigerian constitutional dispute, which culminated in the well-known Privy Council decision of Adegbenro v Akintola.[41] Details of the Adegbenro case are

recorded elsewhere,[42] and all that needs to be said for present purposes will be found in the following two remarks. Firstly, it can be asserted that the statutory rule which regulated the State Governor's dismissal of Chief Akintola was sufficiently vague to invite conflicting judicial interpretation.[43] Secondly, it can be argued that the vagueness of the relevant statutory rule was in part the product of the type of 'political' behaviour which it was attempting to control. A Head of State's dismissal of an unpopular Premier is without doubt a highly sensitive political matter. It involves considerations of policy and propriety, both of which will have to be weighed, as and when the occasion arises.[44] A rigid legal rule may encourage inflexibility, inducing a loss of some of the political sensitivity which should otherwise be displayed.[45]

The vagueness of certain conventional rules has therefore got nothing to do with their non-legal character. It may be attributed instead to the fact that they are political rules,[46] whose systematic codification would be rather difficult to achieve.[47] In these circumstances, it is hardly surprising that obedience to vague conventions is not easy to ensure.

(3) Conventions and the process of change

The obligatory character of constitutional conventions may be hard to reconcile with their capacity for change.[48] There are only four methods of change which writers like De Smith recognise however, [49] and each is compatible with the

notion of obligatory rules. Hence:

(a) Express agreement: the first method of change is through express agreement.[50] As far as change of this sort is concerned Marshall has observed:[51]

> 'One form of conventional change is then the deliberate abrogation of an old convention or the creation of a new one by agreement, if the old rule is felt to be outdated or inconvenient. In this sense, of course, conventions are not rules that have to be followed unconditionally and permanently. It will always be possible for governments or politicians to propose a change of convention. They must be followed only in the sense that they cannot be changed unilaterally and must be complied with if in force until changed by agreement.'[52]

Marshall has failed to mention however, that there is a difficulty with this method of change. At times, it may be hard to determine whose agreement is first required before a conventional rule can be successfully altered.[53]

(b) Change induced by fresh political circumstances: the second method of change may occur because of the development of new circumstances.[54] In this context Marshall has observed:[55]

> 'In this process agreed precedents are the stepping-stones,[56] and arguments about what the conventions are will in principle always be about the existence and implications of existing rules. Like rules of linguistic usage, it will be the case that the rules ultimately reflect what people do. In that sense conventions will become in the end whatever politicians think it right to do. But at any one time what politicians in fact do may conflict with and infringe a rule based on existing precedents or agreements.'

One of the most striking examples of change induced by fresh political circumstances occurred in 1965. Prior

to Southern Rhodesia's unilateral declaration of independence from Britain in November 1965, the British Parliament had already ceased to enact legislation which would have force and effect in the self-governing colony.[57] British legislative restraint was the product of a convention, and it was created by an agreement which had been made in 1961.[58] After the unilateral declaration of independence however, the British Parliament immediately reasserted plenary legislative authority over the rebel colony.[59] De Smith has argued that this could not reasonably be construed as a breach of convention.[60] He argued that the survival of the old convention presupposed the continuance of a constitutional relationship which Southern Rhodesia had repudiated.[61] A similar opinion has been expressed by the Privy Council in the case of Madzimbamuto v Lardner-Burke.[62]

(c) Change induced by the breach of conventional rules: this represents the third method by which conventions can be altered.[63] General acquiescence to breach, however, is a vital prerequisite before change will occur.[64] Events in the United Kingdom during November 1918 represent a clear example of change of this sort.[65] The Prime Minister of the time advised a dissolution of Parliament without placing the decision before the Cabinet.[66] Lloyd George's Cabinet colleagues not merely acquiesced in this step, but erroneously justified it by reference to precedent.[67]

The history of past dissolutions has suggested however that Lloyd George's behaviour was a departure from the norm. Former practice had been for the Cabinet as a whole to determine when to advise a dissolution of the legislature.[68] The breach of 1918 led to a change of convention as Lloyd George's behaviour has been copied by almost all subsequent Prime Ministers of the United Kingdom.[69] Accordingly, the decision to advise a dissolution of the British Parliament is currently taken by the Prime Minister alone.[70]

It has been noted that general acquiescence to breach is crucial to the alteration of convention by this third method. Breach normally leads to the imposition of a sanction on the rule-breaker,[71] but this will not occur if the violation is generally accepted.[72] The attitude adopted by the Cabinet to the proposed breach of convention has an important bearing on the eventual outcome of the violation.[73] Similarly, the attitude of Parliament is important, as Dicey himself was quick to recognise.[74] The significance of parliamentary acquiescence will be more readily appreciated in Chapters VI and VII, when the sanctions which are imposed for breach of convention are examined in considerable detail.

(d) The alteration of 'experimental' conventions: this represents the fourth and final method of change which De Smith has recognised. As far as this final category

is concerned he has said:[75]

> '... decisions by the Prime Minister or the Cabinet about the manner in which the Cabinet is to operate may be superceded by new decisions. But perhaps conventions of this sort ought to be put into a special category in that (like some of the sessional orders of the House of Commons) they are understood to be experimental, though undoubtedly binding until they are altered or discarded in the accepted manner.'

De Smith compares this type of convention with judicial precedents, because the latter are also binding until they are authoritatively reversed, over-ruled or disapproved.[76] The comparison is further emphasised when he says of judicial precedents:[77]

> 'We do not regard them as non-binding merely because their authority may be ephemeral, unless it is clear that they are based on a wrong principle.'[78]

(4) The obligatory character of conventions: some conclusions

De Smith concludes that whether a convention retains its binding force, and if so, how much, is often demonstrable only by the empirical test of 'break it and see.'[79] He goes on to say:[80]

> 'The outcome of such an experiment may still be equivocal; breach may be represented, or interpreted after the event, as a mere ad hoc waiver;[81] allegations of unconstitutional behaviour are frequently made in the cut and thrust of day-to-day politics and are as often shrugged off, sometimes on the spurious ground that no binding convention on the matter had ever existed ...'

As any attempt to list the conventions of the constitution would be unlikely to command universal assent, it is hardly surprising that the binding character of conventional rules is blurred and indistinct.[82] In these circumstances, it is

only to be expected that conventional rules will defy neat categorisation.

(5) Right or entitlement-confering conventions

Marshall has offered a new perspective on the binding character of conventional rules. He suggests that:[83]

> 'The emphasis on obligatory behaviour ... may obscure the point that the conventions, as a body of constitutional morality, deal not just with obligations but also with rights, powers and duties. Some familiar and important conventions do not in fact impose obligations but confer rights or entitlements.'

Two main objections can be raised to Marshall's observations. Firstly, until now, it has been assumed that constitutional conventions are 'rules', and that as such they are obeyed because of the sanctions which can be imposed if they are not.[84] Marshall's observations would seem to indicate however, that right or entitlement-confering conventions are not 'rules'. There is no suggestion for example that such conventions 'ought' to be obeyed,[85] and there is no indication that sanctions can be imposed whenever breach has occurred.[86] Accordingly, it is hard to understand where Marshall's right-confering conventions fit into the usual pattern of non-legal constitutional rules.[87] At face value, Marshall's observations seem to describe usages and practices which amount to something more than convergent behaviour.[88] This does not mean that they should be referred to however, in terms of constitutional 'rules'. Secondly, the examples of right-confering conven-

tions which Marshall has given are inappropriate. He cites two of the rules of collective responsibility in support of his contentions, but neither of his choices is entirely satisfactory. The first rule which he refers to is the one which requires a Minister to refrain from publicly criticising of dissociating himself from government policy.[89] The second rule is one which requires the process by which government decisions have been reached to be kept secret.[90] It is hard to understand how these rules can be interpreted in terms of a 'right' instead of in terms of an 'obligation'. These rules are not observed out of mere choice, but because they ought to be obeyed. The alternative to obedience is not an attractive proposition. Both rules by tradition are carefully observed, because Prime Ministers and Cabinets feel too exposed to criticism if they allow members to indulge in public disagreement with each other.[91] Although a government can continue in power for as long as it enjoys the support of the legislature,[92] it remains important for electorally damaging splits and resignations to be avoided.[93] Every Cabinet Minister appreciates that his hold on office is based upon membership of a united party which enjoys majority electoral support.[94] Collective responsibility helps to re-inforce the necessary party unity.[95] It thus helps to safeguard each Minister's hold on the reins of power. Ultimately therefore, it can be argued that solidarity and secrecy 'ought' to be obeyed, because adverse consequences may well result if they are not. Accordingly, the rules of collective responsibility

that moral standards are taught or communicated as a matter of course to all in society;[100]

(c) There is general recognition that if moral standards were not generally accepted, far-reaching and distasteful changes in the life of individuals would occur.[101] While there can be no doubt that many constitutional conventions are considered to be important,[102] others can be disregarded without any grave consequences for society.[103] Importance therefore, would not seem to be an essential attribute of rules which are described as conventional in character. Marshall has remarked that many constitutional conventions are wholly morally neutral.[104] Furthermore, he has gone on to suggest that governments may decide to ignore particular conventional rules, if an over-riding moral justification can be perceived for such a course of action.[105]

(2) Immunity from deliberate change

Hart has argued that standards of conduct cannot be endowed with, or deprived of, moral status by human fiat.[106] Hence, moral rules cannot arise or change through simple agreement. An earlier part of this chapter has already shown however, that the same cannot be said in respect of conventional rules.[107] Marshall has commented that unlike moral rules, the content of all conventional rules is determined to some extent by the special agreement of the

parties affected thereby.[108] In many instances therefore, the revision, change or abolition of conventional rules may be traced back to an alteration, or a termination of the agreement concerned.[109] It has already been noted that conventions do not have to be followed unconditionally and permanently.[110] Governments and politicians are always able to propose changes to convention.[111]

(3) The voluntary character of moral offences

Hart has asserted that a person will be excused from moral responsibility for breach of moral rules or principles as long as he can show that breach was unintentional, and that it occurred despite every possible precaution that he was able to take.[112] The same cannot be assumed, however, in respect of a breach of conventional rules. It is difficult to imagine the circumstances in which a government would be able to claim that a breach of convention was both unintentional and unavoidable. Furthermore, even if such circumstances did in fact exist, the issue of responsibility would be determined by Parliament.[113] There is no reason to suppose that Parliament would acquiesce in the breach, as the attitude of the legislature would be influenced by a considerable number of different political factors.[114] Much would also depend on the importance of the constitutional convention who's breach has been involved.[115] The response to a breach of a conventional rule therefore, could be quite different from the response to a breach of a moral rule.

(4) The form of moral pressure

Hart has noted that the moral pressure which is used to support moral rules is distinctive.[116] The typical form of such pressure consists of appeals to those who share the rules.[117] The appeal seeks to re-inforce respect for the rules as things important in themselves.[118] Accordingly, moral pressure is usually exerted by reminders of the moral character of the action contemplated and of the demands of morality.[119] Hart has also observed that pressure is rarely exerted in the form of threats or appeals to interest or fear.[120] He has commented that emphatic reminders of what moral rules demand, appeals to conscience, and reliance on the operation of guilt and remorse, are the characteristic and most prominent forms of pressure used for the support of social morality.[121]

The forms of pressure or sanction which are used to support the conventions of the constitution will be examined in considerable detail in chapters VI and VII. At this stage it would be appropriate to note however, that the sort of moral pressure which has been described by Hart is not crucially important for the observance of conventions. Dicey argued that nothing less than the force of law stood behind obedience to constitutional conventions.[122] Other writers have suggested alternative reasons for obedience, such as fear of political difficulties and the protection of plain self-interest.[123] Moral 'feelings' may indeed have a small role to play,[124] but their effectiveness can always be

re-inforced with pressures of a more practical nature.

III THE ESTABLISHMENT OF CONVENTIONS

(1) Precedents and Agreements

Constitutional conventions may arise in at least two different ways.[125] They may arise through:

(a) Precedents or usages which have given rise to a binding rule of behaviour;[126] or

(b) Agreements among the people concerned to work in a particular way and to adopt a particular rule of conduct.[127]

It is not difficult to ascertain the establishment of conventions which are the product of specific agreements.[128] The establishment of the Commonwealth conventions for example, can be traced back to the resolutions of various Colonial and Imperial Conferences.[129] Greater uncertainty abounds however, over the establishment of conventions which arise from precedent.[130] As Hood Phillips has said:[131]

> 'It is not easy to say precisely how or when conventions based on usage come into existence. Every act by the Queen or a responsible statesman is a "precedent" in the sense of an example which may or may not be followed in subsequent similar cases, but it does not necessarily create a binding rule.'

Two alternative approaches may be adopted to deal with this particular difficulty. The first of these may be called the 'descriptive' approach, and the second one as the 'prescriptive' approach to constitutional conventions.

(2) Precedent: a descriptive approach

Hood Phillips believes that the general acceptance of a practice or precedent as obligatory is all that is required before a convention can be said to come into being.[132] Such a view means that the existence of a convention is largely determined by the beliefs of the people involved with the actual workings of the rule.[133] Hood Phillips' opinion can be regarded as a descriptive approach as far as the establishment of conventions are concerned.[134] This is because the creation of a binding rule becomes a question of historical and sociological fact.[135] Marshall would categorise conventions which are described in this way as the 'positive morality' of the constitution.[136]

This particular approach to the establishment of conventions has been criticised by several leading constitutional writers.[137] Its probable demise has been hastened by the Supreme Court of Canada, which has decided to favour the alternative 'prescriptive' test in relation to the establishment of conventions.[138]

(3) Precedent: the prescriptive approach

Jennings has criticised the descriptive approach, because he has argued that the beliefs of participants in the political process may be wholly erroneous.[139] Consequently, he has developed his own, simple guide to help determine whether a convention exists or not.[140] This guide involves three principal considerations:

(a) What are the precedents?

(b) Did the actors in the precedents believe that they were bound by a rule?

(c) Is there a reason for the rule?

The personal beliefs of the participants in the political process are clearly one of the factors which Jennings is willing to take into account. Such beliefs are not conclusive proof however, either one way or the other. As far as Jennings is concerned, a convention will be recognised only if there is a good reason for the existence of the rule.[141] Furthermore, he has argued that this 'good reason' must accord with the prevailing political philosophy of society.[142] Accordingly, not only does a convention have to be obligatory in character, it has to complement the general framework of the particular constitution with which it is associated.[143] Under Westminster-style government, Jennings has argued that convention would have to help the democratic system operate more smoothly.[144] He has concluded by saying:[145]

> 'A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it. And then ... the convention may be broken with impunity.'[146]

Jennings and his supporters may be said to adopt a 'prescriptive' approach to the creation of conventions.[147] They regard conventions as prescriptive statements of what 'should' happen, based in part upon observation and in part

upon constitutional principle.[148] Consequently, conventions may be described as the rules which political actors ought to feel obliged by - if they have considered the precedents and reasons correctly.[149] Marshall refers to conventions which are viewed in this manner as the 'Critical Morality' of the constitution.[150] Of the two alternative approaches to the creation of convention from precedent, the latter appears to be the most satisfactory.[151] As Marshall says:[152]

> 'It allows critics and commentators to say that although a rule may appear to be widely or even universally accepted as a convention, the conclusions generally drawn from earlier precedents, or the reasons advanced in justification, are mistaken. This, on some occasions, is what political or academic critics do wish to say. But if the existence of a convention were only a question requiring empirical investigations of politicians beliefs, it would be impossible to say that they wrongly believed a convention to exist.'

The one problem with the 'prescriptive' approach is that it fails to take account of the vague conventions. It may be difficult to describe how a political actor 'ought' to behave, if the content of a particular rule is open to varying interpretations. This will become more apparent in Chapter VII, especially in relation to the convention of Ministerial responsibility.[153]

CHAPTER VI

LEGAL RULES AND CONVENTIONAL RULES : THE DISTINCTION

I. INTRODUCTION

The analysis of the previous chapter has helped to demonstrate that conventional rules can be distinguished from other types of non-legal rule. The most controversial aspect of any study of conventions, however, centres upon the exact nature of the relationship between the non-legal rules of the constitution and ordinary rules of law. Key aspects of this particular controversy are associated with the views of two well-known constitutional writers. Dicey has been attributed with one particular perspective on the relationship between law and convention, while Jennings may be said to have an utterly opposing point of view. The disagreement between these two writers is one of the main themes of both this chapter and the one which immediately follows. In the present chapter, the opposing views of both writers will be examined in a constitutional context which is overwhelmingly British. An attempt will be made to reassess their opinions, however, in view of two innovative analyses which have stemmed from both Munro and the Supreme Court of Canada.[1] The exact nature of the relationship between law and convention will be placed in a South African context in Chapter VII.

II THE VIEWS OF DICEY

In his definition of 'Constitutional Law', Dicey has asserted that 'law' and 'convention' are separate and distinct.[2] He has

pointed out that this distinction is based on the method of enforcement of the two different types of rule.[3]. On the one hand, Dicey has argued that a rule of law can be enforced by the courts.[4] On the other he has emphatically rejected the notion that a rule of convention is enforceable in the courts.[5] At first sight this may seem a little puzzling, because Dicey has insisted that conventions are obligatory. It is hard to understand how conventions can be obligatory, if respect for these rules cannot be safeguarded through enforcement in the courts. A considerable portion of Dicey's writing was devoted to the unravelling of this apparent paradox, and it is therefore necessary to examine his ideas in a certain amount of detail.

(1) The sanctions behind enforcement of the conventions

Although Dicey has conceded that not all of the conventions are obeyed all of the time,[6] he has insisted that neither the Crown nor any servant of the Crown ever refuses obedience to the underlying, fundamental principle of the constitution.[7] Government, in other words, has to be carried on in accordance with the will of the House of Commons, and ultimately with the will of 'the nation' as expressed through that House.[8] Dicey has proceeded to investigate the methods by which obedience to conventions is normally ensured. He has rejected the following two methods, however, as wholly inadequate.[9]

(a) Impeachment

According to the first of these two rejected approaches, conventions should not be regarded as 'understandings' at

all, but as 'laws' in the truest sense of the term.[10] The one peculiarity of these 'laws', however, is that they are enforced through the High Court of Parliament.[11] Obedience is not secured through the ordinary courts of the land. The enforcement of these 'laws' through the High Court of Parliament is a process known as 'Impeachment'.[12] Although this process may have influenced the conduct of statesmen in the distant past, Dicey has dismissed the notion that it has had any appreciable influence over the behaviour of modern statesmen.[13] He remarked that:[14]

> 'The process, which is supposed to ensure the retirement from office of a modern Prime Minister, when placed in a hopeless minority, is, and has long been, obsolete. The arm by which attacks on freedom were once repelled has grown rusty by disuse; it is laid aside among the antiquities of the constitution, nor will it ever, we may anticipate, be drawn again from its scabbard'.

Dicey has also argued that Impeachment is a questionable method of trying to restrain a daring politician, because the whole process is dependant upon the success of proceedings which have to be conducted in Parliament.[15] A Minister who was dreading Impeachment could always circumvent the process, if the Crown could be advised not to summon Parliament.[16] Of course, such circumvention would provide only temporary relief for a politically embattled Minister, because Parliament would have to be summoned sooner or later.[17] There would seem to be considerable force in Dicey's observations however. Impeachment is a process which is now unknown in modern Britain. It has not been used for over a

century and a half.[18] In South Africa, the powers and privileges of Parliament are regulated by statute.[19] The Impeachment procedure is not governed by such legislation however, and it is doubtful whether such a process may be utilised in this country.[20] It is interesting to note that VerLoren Van Themaat treats the constitutional provisions for the removal of the State President as roughly equivalent, or related to Impeachment.[21] It is hard to envisage any circumstances, however, in which a South African State President would be subjected to such removal procedure. Resignation would be preferable to the prospect of a total public humiliation.

(b) Public Opinion

The second, supposed method of securing obedience to conventions is the force of public opinion. Dicey would not seem to hold much faith with the force of public opinion either.[22] He conceded that 'the Nation' would expect Parliament to be convened annually.[23] It would also expect a Minister to resign if he lost the confidence of the House of Commons.[24] This does not necessarily mean, however, that public opinion is a sanction capable of compelling obedience to the conventions of the constitution.[25] Dicey has argued that public opinion is of little effect in guaranteeing obedience to the 'law of the land'; crimes are always being committed, notwithstanding the law-abiding sentiments of the majority of people.[26] He has argued that in the last resort, law is obeyed because of the physical power at the disposal of the state to ensure that such obedience is obtained.[27]

Having adopted a strongly 'Positivist' view of the law,[28] Dicey went on to draw a parallel between law and convention. He asserted that:[29]

> 'To contend that the understandings of the constitution derive their coercive power solely from the approval of the public, is very like maintaining the kindred doctrine that the conventions of international law are kept alive solely by moral force'.

(c) The force of law

Dicey went on to say that if an element of force is needed to achieve conformity to the rules of international law, then something in addition to public approval must give force to the conventions of the constitution.[30] This extra force, he believed, was nothing less than the force of law.[31] Dicey has conceded that the dread of Impeachment and the force of public opinion have contributed to the development of modern British political ethics.[32] More than anything else, however, he believed that:[33]

> '... the sanction which constrains the boldest political adventurer to obey fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that breach of these principles and of these conventions will almost immediately bring the offender into conflict with the courts and the law of the land.'

Dicey then proceeded to use concrete examples, which helped to demonstrate that the fundamental maxims of the British constitution are safeguarded by force of law.[34] It was noted in Chapter V that if Parliament did not meet for more than one year, it would be difficult for the Crown to lawfully maintain the Army.[35] It would also be impossible to levy taxes or

spend public revenues.[36] Consequently, although the rule that Parliament must convene once a year is a conventional rule which cannot be enforced by the courts, it cannot be violated without involving hundreds of persons in distinct acts of illegality which are cognizable by the courts.[37] Accordingly, Dicey was able to show that the convention which prescribes annual meetings of Parliament is in reality based upon, and secured by the law of the land.[38] In much the same way he was able to demonstrate that a Ministry must resign or submit itself to re-election, whenever it is censured by the House of Commons.[39] Violation of this convention will almost inevitably lead to a breach of the law, because a determined House of Commons has the means at hand to impose its will on a recalcitrant government.[40] As Parliament enjoys ultimate legal control over 'the Purse and the Sword', the government can be forced to choose between upholding the constitution or breaking the law.[41]

Dicey was well aware of the fact that there were flaws in his contentions.[42] A government may always seek to gain its ends through the execution of a 'Coup d' Etat'. Nothing would seem to be able to restrain a government which is determined to overthrow the law. This fact was a political reality which Dicey was quick to recognise.[43] He acknowledged that government-led revolution will lead to a violation of the law.[44] No constitution is ever safe, he conceded, and no law is beyond defiance.[45] He insisted, nevertheless, that a desire to obey the law will hinder the ability to defy

convention.[46] He reiterated that conventions derive their power from the fact that they cannot be broken without a breach of the law.[47] Hence, a government must accede to the demands of convention if it desires to remain within the letter of the law.

It is interesting to note that the British Parliament has never cut off the supply of money to the Crown, nor has it refused to pass the Army (Annual) Act and its modern successors.[48] It could be argued, therefore, that the legislature's power in this regard has grown 'rusty with disuse'. It may well have joined the process of Impeachment among the antiquities of the constitution. There is considerable force in this suggestion, and it may be assumed to underlie the radically different contentions which are proferred by Jennings. It should not be forgotten, however, that Dicey had anticipated observations of this sort. He asserted that:[49]

> '... the power of Parliament to compel obedience to its wishes ... is so complete that the mere existence of the power has made its use unnecessary ... To this we must add, that in the rare instances in which a Minister had defied the House, the refusal to pass the Mutiny Act has been threatened or contemplated.'

There is one final objection to Dicey's contentions. Many conventions are somewhat vague, and it may be hard to establish whether they have been violated or not.[50] In these circumstances, it cannot be stated with any certainty that a breach of convention will automatically lead to a concomitant breach of the law. Other conventions, moreover, may be

broken with impunity, because Parliament may choose to disregard the violation of such rules.[51]

Awareness of the fact that sanctions are not always clearly imposed does not in any way undermine the strength of Dicey's arguments. He has emphasised that the purpose of conventions is to underpin the fundamental principle of the Constitution. This means that conventions are designed to ensure the obedience of all persons to the deliberately expressed will of the House of Commons, and ultimately to the will of 'the nation' as expressed through that House.[52] The imposition of a legal sanction for the breach or disregard of convention is a matter entirely for Parliament to determine. Only Parliament can decide to cut off the supply of money to the government, and only Parliament can decide to let the Army and Air Force Acts lapse. The choice whether or not to impose legal sanctions is thus exclusively in the hands of the legislature, and this can only be regarded as consistent with basic constitutional principle. Accordingly, there is no convincing reason why Parliament should not be able to waive the application of a particular conventional rule in unusual circumstances. Similarly, there is no convincing reason why it should not be entitled to waive the imposition of sanctions, whenever it is uncertain about the full content of a vague conventional rule.

There are several more grounds on which it is possible to criticise Dicey's opinions. Many of these are explored by Jennings - a writer who has long been regarded as one of Dicey's most strident adversaries.[53] Accordingly, much of

the remainder of this chapter will be devoted to Jennings' analysis of the sanctions behind conventions of the constitution. In this way it is hoped that a fuller understanding may be attained of the relationship between law and convention.

III THE VIEWS OF JENNINGS

Jennings has adopted the attitude that law and convention are inextricably linked.[54] He has conceded that a formal distinction of the kind recognised by Dicey does exist,[55] but he argued that this distinction is of no great substance in practice.[56] Jennings has implied that the legal force behind the conventions of the constitution has grown 'rusty with disuse.'[57] He concluded that law and convention are obeyed for the same reasons - the reasons in both cases being 'consent' or 'acquiescence' rather than a fear of courts of law.[58] Jennings' main line of attack, therefore, has been to undermine Dicey's analysis of the sanctions which safeguard obedience to convention. His attack may be considered under four headings.

(1) Time-lapse

Jennings' first line of attack was to note that if the government breached a constitutional convention, there could be a considerable time-lapse before any subsequent illegalities would ensue.[59] A time-lag would develop until the current Appropriation Act had expired, or until the legislation which governs the armed forces had run its course and thereafter lapsed.[60] This line of attack would appear to

be without substance. It sheds no further light on the true nature of the relationship between law and convention. Although Dicey did not scrutinize the implications of a time-lapse between the breach of convention and any ensuing illegality, his writings have implied that such delay is not of any significance.[61] To the extent that breach of convention may lead directly to a breach of the law, there is nothing in Jennings' observations about time to invalidate the force of Dicey's analysis.

(2) Loans

Secondly, Jennings was not happy with Dicey's contentions in relation to the government's authority to raise and expend public revenues.[62] Jennings has argued that permanent legislation entitles the Crown to raise revenues by way of loan.[63] He has noted that when the House of Lords rejected Lloyd George's budget in 1909, the government was able to avert financial disaster through the utilisation of loans.[64] The capacity of the United Kingdom government to finance itself with loans clearly weakens the ability of Parliament to disrupt the government's financial objectives. Beyond this, however, there seems to be little of substance in Jennings' observations. Although the Executive can circumvent Parliament's refusal to authorise the imposition of taxes, this does not mean that revenues obtained by government borrowing can be spent without reference to the legislature. As Jennings himself conceded, no money can be spent by the government unless it is authorised by Parliament.[65]

Consequently, the possible use of loan-raising powers by the Executive would not materially prejudice the ability of Parliament to control the financial programme of the government. It can be contended, therefore, that the substance of Dicey's analysis remains intact.

(3) Conventions unsupported by law

Jennings' most effective criticism is his assertion that Dicey's ideas only apply to those few, rather important conventions which determine the relationship between the Cabinet and the House of Commons.[66] He demonstrated this contention by reference to those conventions which he believed could be violated without any consequential breaches of the law.[67] He noted that if lay Peers attended the judicial proceedings of the House of Lords, it would be hard to imagine that a breach of the law would necessarily follow.[68] Using another of his persuasive examples, he argued that the withdrawal of the recognition accorded to 'Her Majesty's Opposition' would not, similarly, lead to a violation of the law.[69] Jennings has discovered a defect in Dicey's analysis which must carry considerable weight. At the same time it must be remembered, however, that Dicey recognised the existence of conventions which could be broken without concomitant breaches of the law. Dicey has explained this anomaly in terms of the vagueness of certain conventions.[70] His comments about Parliament acquiescing in a breach of convention would also be relevant in this context.[71]

As a by-product of his attack on Dicey's ideas, Jennings has helped to make the reasons for obedience to conventions somewhat clearer. Cutting off the supply of money to the government, or allowing armed forces legislation to lapse, could only seriously be threatened by Parliament in exceptional circumstances.[72] Other factors must obviously come into play, and it was Jennings' belief that the political attitude of the House of Commons was crucial in this regard.[73]

(4) The political sanctions behind obedience to convention

Jennings believed that political factors were important with regard to continued respect for conventions. He argued that the real question which is presented to a government is not whether a rule is 'law' or 'convention', but what the House of Commons would think about it if a certain action was proposed.[74] He amplified this idea further when he observed:[75]

> 'The protection against illegal and unconstitutional action is the same. In the case of a Government it lies in the power of the opposition to use the action as political ammunition... The government has to justify itself in a House of Commons where, certainly, it has a majority, but where every member holds his seat through popular support, where there is an official opposition to act as the spear-head of every attack, and which is itself imbued with democratic traditions. Few of the government's actions lose votes in the House of Commons, though they would if they were serious; but the government requires votes not merely in the House itself but in the country generally if it is to maintain itself in office. Here as elsewhere the primary protection is the operation of the democratic system, the right of the electorate to choose freely - a right which really means in practice a right to turn out any government that it does not like.'[76]

The restraining influence of political factors on the actions of the government have also been echoed by other writers. MacIntosh, for example, has commented:[77]

> 'The second major limitation on the freedom of action of the Prime Minister and his colleagues is the need to carry public support as institutionalised in the House of Commons and in the majority party ... While a government does not need to have the backing of the press or of the public as revealed in opinion polls or by-elections or referenda, evident lack of support is a source of weakness which becomes greater with the approach of a general election at which the government may be defeated. For these reasons all ministers pay close attention to both the House of Commons and the other indicators of public feeling...'

Similar sentiments have been expressed by Wade.[78] Accordingly, there would seem to be considerable force in the idea that governments obey convention because of the political difficulties which may follow if they do not.[79] In the light of this conclusion, doubts may now be cast over the continued validity or relevance of Dicey's original analysis. It may be argued that the legal sanctions behind enforcement of the constitutional conventions are as redundant now as the process of Impeachment. Jennings' emphasis on the political factors which help to safeguard respect for the conventions is not entirely satisfactory however. It is misleading to suggest that the right of the electorate to defeat a government at the polls somehow protects the obligatory nature of conventional rules. There are no legal obstacles to prevent the legislature from abolishing the democratic basis of British government altogether.[80] This may be asserted because a sovereign British Parliament may terminate the need

for regular elections by ordinary legislative enactment.[81] It is hard to foresee the circumstances in which the government might persuade Parliament to subvert the democratic principles of the British constitution. There can be little doubt, nevertheless, that the termination of elections would prevent the electorate from 'punishing' a government which had broken with the accepted constitutional conventions of the day. It is ironic that in order to understand why successive British governments have submitted themselves to a test of popularity at the polls, it may be useful to refer to Dicey once again.

IV DICEY AND JENNINGS : A LIMITED SYNTHESIS

Dicey believed that the exercise of sovereign power is always limited by a combination of external and internal factors.[82]

(1) External limits to sovereign power

Dicey explained what he meant by external limitations on power in the following terms:[83]

> 'The external limit to the real power of a sovereign consists in the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws'.

The authority of a sovereign, in other words, depends upon the readiness of his subjects, or of some portion of his subjects to obey his behests.[84] Dicey argued that in reality, this readiness to obey must always be limited.[85] Accordingly, it can be said in a modern political context that the sovereignty of Parliament is limited on every side

by the possibility of popular resistance.[86] Dicey proceeded to list the various types of legislation which a British Parliament would be unable to enact and observed:[87]

> 'In each case widespread resistance would result from legislation which, though legally valid, is in fact beyond the stretch of parliamentary power. Nay, more than this, there are things which Parliament has done in other times, and done successfully, which a modern Parliament would not venture to repeat. Parliament would not at the present day prolong by law the duration of an existing House of Commons.[88] Parliament would not without great hesitation deprive of their votes large classes of Parliamentary electors...'[89]

Although Dicey's comments were strictly limited to explaining restraints which may influence the behaviour of a sovereign power, there are certain similarities with the ideas expressed by Jennings. It was the latter who asserted that law and convention both rest upon the acquiescence of the community.[90] Jennings believed that where there is great opposition to the enforcement of a rule, its effectiveness must be called into question.[91]

A combination of the views of these two writers might help to explain why the British Parliament has resisted any temptation to abolish elections. A law which outraged the feelings of the community would need considerable determination to enforce. The possibility would always exist that the enforcement of such a law would lead to revolt against that very sovereign power which had created the unpopular law in the first place.

The hostile reactions of the community to the actions of a sovereign power are not, however, the only factors which

militate against the exercise of untrammelled power. Dicey believed that 'internal limitations' also exist, which may inhibit a sovereign authority from using power in certain ways.

(2) Internal limits to sovereign power

Dicey explained what he meant by internal limitations on power in the following terms:[92]

> 'The internal limit to the exercise of sovereignty arises from the nature of the sovereign power itself. Even a despot exercises his powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs ... the internal check works together with the external check, and the influence of the internal limitation is as great in the case of a Parliamentary sovereign as of any other; perhaps it is greater.'

Dicey conceded that the boundaries of the external and internal limitations on sovereignty are blurred and indistinct.[93] He was aware of the fact that the nature and extent of the two types of limitation do not necessarily coincide.[94] Wade has been able to marry the two concepts together, however, and in the observations which follow he managed to fill the lacuna which Jennings had overlooked. The following remarks by Wade are thus supplementary to Jennings own contentions:[95]

> 'They [Ministers] are influenced in their political conduct by the desire to govern in accordance with the traditions of representative government. In short, whether it be the sovereign in the exercise of the personal prerogatives, or Ministers in all other public conduct, there is a standard of political authority which commands obedience.'[96]

Wade's observations are as relevant to the conduct of a sovereign legislature as they are to the behaviour of Ministers and other members of the executive branch of government. They help to explain why Parliament has not attempted to enact legislation to abolish elections, and they would explain why Ministers have resisted the temptation to introduce such measures to the floor of the Commons.

(3) Conclusion

It may be concluded that Jennings' emphasis on the political factors which inhibit a government from breaching convention is highly persuasive. These political factors will only continue to work as an effective restraint, however, if the democratic character of government prevails as the fundamental constitutional theory of the day.[97] Constitutional conventions are designed to give expression to the democratic principle in Westminister-style government.[98] Accordingly, any weakening of respect for the democratic basis of government will seriously threaten the existence of those conventions which underpin democracy in practice.[99]

V LAW AND CONVENTION : MUNRO'S ALTERNATIVE PERSPECTIVE

Although the purpose of the present chapter is to explore the relationship between law and convention, the focus of attention has tended to concentrate on the sanctions which give force to the conventions of the constitution. The emphasis which has been placed on sanctions is perfectly understandable, however, because it is an essential component in Dicey's treatment of the

dichotomy between legal and conventional rules. Dicey believed that a distinction could be made between law, on the one hand, and conventions on the other. He argued that a legal rule was enforceable by courts of law, whereas a conventional rule could never be enforced by the courts of the land.[100] Jennings' perception of the relationship between law and convention was in sharp contrast to the approach which Dicey had adopted. Jennings believed that law and convention are fundamentally the same, because both types of rule rest, ultimately, on consent or acquiescence.[101] Obviously, in this context, the nature of sanctions is important, and it is therefore understandable that Jennings became so preoccupied with reasons for obedience to legal and conventional rules.[102]

Jennings has demonstrated the important role which political factors can play in safeguarding obedience to the conventions of the constitution. Even his most ardent critic, Munro, acknowledges the value of Jennings' analysis in this particular respect.[103] Munro has ably demonstrated, however, that the emphasis on sanctions is an erroneous one.[104] He believes that an understanding of the relationship between law and convention involves far more than a simple analysis of the sanctions which are behind either type of rule.[105] His approach to the study of law and convention is therefore quite distinct from that of the two main protagonists in this field. Munro's point of view will now be examined, because no proper understanding of the disagreement between Dicey and Jennings is possible without him.

First of all it should be noted that Munro approves of Dicey's 'court-enforcement criterion'.[106] He considers it to be an

adequate litmus-test for distinguishing law and convention.[107] The reasons he used to support this contention will become apparent elsewhere in this chapter.[108] For the moment, however, it is important to note that he feels the court-enforcement test can be supplemented in various ways.[109] He points out that the differences between law and convention can be illuminated by the many inquiries of legal philosophers into the meaning of the term 'law'.[110]

Notwithstanding various other options, Munro has chosen to focus on Hart's model of a legal system.[111] He proceeds to demonstrate, quite graphically, that conventional rules have no place in Hart's theoretical system of law. They cannot be reconciled in any meaningful way with the ancillary or secondary rules which are inherent in the abstract legal model which Hart has constructed.[112]

(1) Primary Rules of Obligation

Munro asserts that Hart found the key to jurisprudence in a combination of primary and secondary rules.[113] The primary rules are described as duty-imposing rules or rules of obligation.[114] Every known society has had such primary rules, and it is conceivable that a primitive society might possess only such rules.[115] A society which only recognised primary rules of obligation, however, would lack the essential requirements of a proper legal system.[116] While a primary rule of obligation can prescribe a certain standard of behaviour, it cannot be used to determine the existence of other primary rules.[117] One primary rule cannot be used to

introduce or change another, and one rule of obligation cannot prescribe the circumstances in which the violation of others is declared.[118] These drawbacks apply equally to constitutional conventions, because they are also primary rules of obligation whose requirements ought to be obeyed.[119] Munro is therefore able to say:[120]

> 'The situation without secondary or ancillary rules is likened by Hart to the rules of etiquette, as well as to the model of an early primitive community. The analogy applies equally to constitutional conventions.'

The rule of Recognition is the first of Hart's ancillary or secondary rules.[121] The other two are the rule of Change and the rule of Adjudication.[122] The three of them are vitally important to Hart's system of law, but Munro is able to demonstrate their incompatability with the character of conventional rules.

(2) The Secondary or Ancillary rules

(a) The rule of Recognition

Hart has asserted that primary rules do not form 'a system', because they are without any identifying or common mark.[123] He goes on to point out:[124]

> 'Hence, if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative. For, plainly, such a procedure and the acknowledgement of either authoritative text or persons involve the existence of rules of a type different from the rules of obligation or duty which ex hypothesi are all that the group has.'

Primary rules would therefore be plagued with uncertainty,[125] unless they could be supplemented by an ancillary rule which remedies the problem. Hart suggests that the simplest remedy is the introduction of a rule of Recognition.[126] He goes on to say that in a developed legal system, the rule of Recognition is quite complex.[127] It identifies primary rules by reference to some general characteristic which they all possess.[128] He says:[129]

> 'This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions ... By providing an authoritative mark it introduces ... the idea of a legal system : for the rules are now not just a discrete unconnected set but are, in a simple way, unified.'

Munro shows that this analysis cannot be extended by analogy to conventional rules. He argues:[130]

> 'Contrast conventions. There is no authoritative mark of their existence, so that uncertainty abounds. The sources of convention are open-ended and diverse, and no importance attaches to them. Conventions have no unifying feature and so do form merely a "discrete unconnected set" ... The existence of a convention is tested, so far as it can be, by its individual content - an inference has to be made according to the strength and purpose of the particular political practice involved.'

Munro's observations echo many of the issues which were highlighted in the previous chapter of this work.[131] It has already been pointed out that an attempt to list the conventions of the constitution would be unlikely to command universal assent.[132] One of the few ways of finding out whether a rule is conventional or not is 'to break it and

see'.[133]

(b) The rule of Change

The static character of primary rules is another of the drawbacks of which Hart is aware.[134] He notes:[135]

> 'There will be no means ... of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones: for, again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives.'

Hart assets that the remedy for the 'static' quality of primary rules is the introduction of a rule of Change.[136] He says that the simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules.[137]

Munro is able to demonstrate that the rule of Change has no application to a collection of purely conventional rules. He remarks:[138]

> 'Thus, a working legal system has express or implicit provisions specifying how the legislative process is to operate, how laws may be repealed, and so on. Given the absence of a means to recognise conventions, it is hardly surprising to find that there is equally no definite means of knowing when a new convention comes into being or an old one is amended or abolished.'

The uncertainty which attaches to the creation of convention has already been examined in the previous chapter.[139] It was noted that difficulties can also arise in relation to the process of change.[140] A convention may be changed, for example, by express agreement, but even

amendment by this procedure can play host to certain problems. At times it may be unclear who must be a party to such an agreement before the relevant conventional rule can be successfully changed.[141]

(c) The Rule of Adjudication

Hart notes that primary rules suffer from a third defect, which he describes as the inefficiency of the various social pressures by which the rules are supposed to be maintained.[142] He says:[143]

> 'Disputes as to whether an admitted rule has or has not been violated will always occur and will ... continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation.'

The adoption of a rule of Adjudication overcomes the inefficiency to which Hart has drawn attention.[144] The rule empowers individuals to make authoritative determinations of the question whether or not a primary rule has been broken on a particular occasion.[145] Besides identifying the individuals who are to adjudicate, Hart says the rule will also define the procedure to be followed.[146] Like the other secondary rules, the rule of Adjudication is on a different level from the primary rules.[147] Hart goes on to say that the rule confers judicial powers and a special status on judicial declarations about the breach of obligations.[148] Like the other secondary rules, it defines an important group of legal concepts: in this case the concepts of judge or court, jurisdiction and judgment.[149]

Munro highlights the absence of a rule of Adjudication from the ambit of conventional rules. He argues:[150]

> 'Contrast conventions. There is, of course, no final judge of their violation or interpretation, any more than of their existence. Moreover, whereas the question of a breach of law is generally externally and authoritatively determined, by officials forming only a small part of those to whom the law applies, conventions are generally self-interpreted, often variously, by those to whom they apply.'

Munro concludes his examination of Hart's system of law by making some final observations about the application of sanctions. He notes:[151]

> 'The sanctions of law are institutionalised and display some degree of predictability. The consequences of a breach of convention have considerably less certainty, except in one respect, their self-destructive quality. If a convention is defined as "a rule of behaviour accepted as obligatory by those concerned in the working of the constitution", then, once such a rule is broken, it becomes appropriate to ask whether it may still be regarded as binding.'

His comments about the application of sanctions echo several observations which were made in the previous chapter of this work.[152]

Munro has persuasively argued that the conventions lack any secondary rules. They cannot be reconciled with Hart's system of law, and thus serious doubts must now arise with regard to one of Jennings' most basic contentions. His belief that law and convention lack any distinction of substance has been radically undermined.

VI. THE COURT-ENFORCEMENT TEST : A REHABILITATION

Earlier it was noted that Munro regards the court-enforcement criterion as the litmus-test to distinguish law and convention.[153] His description of Hart's system of law was merely designed to reinforce the arguments in favour of Dicey's classic analysis of the two different categories of rule. It is implicit in Munro's examination of the rule of Adjudication that conventional rules are incapable of enforcement in court.[154] There can be little doubt that the whole tenor of his arguments, however, assumes that rules of law are enforceable in court.[155] The question whether or not this litmus-test amounts to anything in substance is a matter which has preoccupied Jennings.[156] After reviewing both statutory provisions and a certain amount of case law, Jennings came to the conclusion that the test is wearing thin.[157] He laid heavy stress on a number of court judgments which have extended a certain amount of 'recognition' to the existence of conventional rules.[158] This induced him to declare:[159]

> '... the boundary between law - legislation and case law - and convention is wearing very thin, and ... even judges are not always certain where it lies.'

It can be argued, however, that 'the proof of the pudding is in the eating'. There would seem to be very little evidence that the judges are confused. This can perhaps best be illustrated by reference to some of the judges themselves. There are two notable cases which have been heard since Jennings first publicised his point of view, and both of these have emphatically

rejected the temptation to declare the judicial enforceability of conventional rules.

(1) The case of Madzimbamuto v Lardner-Burke[160]

The Privy Council expressed the opinion in Madzimbamuto v Lardner-Burke that they were quite unconcerned with conventional rules which were in conflict with statute law. Their Lordships observed:[161]

> 'If the Queen in the Parliament of the United Kingdom was sovereign in Southern Rhodesia in 1965, there can be no doubt that the Southern Rhodesia Act 1965, and the Order in Council made under it were of full legal effect there ... The learned judges refer to the statement of the United Kingdom Government in 1961 ... setting out the convention that the Parliament of the United Kingdom does not legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly. That was a very important convention but it had no legal effect in limiting the legal power of Parliament.
>
> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it has highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid. It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention ... Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament'.

The importance of this judgment should not be over-emphasised, however. No real attempt was made to analyse the relationship between law and convention. The Judicial Committee did not assert that a conventional rule is incapable of enforcement in court. Their opinion was merely a restatement of judicial attachment to the long held

doctrine of the sovereignty of Parliament.[162] A legal rule which has been enacted by one Parliament cannot be used to restrict any of its successors.[163] It is only logical to conclude, therefore, that conventional rules are equally incapable of such an inhibiting effect.

A clear statement of judicial attitudes to the court-enforcement of convention, nevertheless, may be discovered in the following recent judgment of the Supreme Court of Canada.

(2) Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3)[164]

The majority opinion of Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer J J of the Supreme Court of Canada in the case Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3), represents the ultimate vindication of Dicey's court-enforcement criterion.[165] In a strikingly clear analysis of the relationship between law and convention, the court rejected the entire concept of the judicial enforcement of non-legal rules. The learned judges noted:[166]

> 'The conventional rules of the Constitution present one striking peculiarity. In contradistinction to the laws of the Constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and the duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.
>
> Perhaps the main reason why conventional rules cannot

> be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.'

The court referred to the royal veto as an example of a matter over which law and convention are in direct conflict.[167] It was noted that while, as a matter of law, the Queen can refuse assent to every Bill passed by both Houses of the Canadian Parliament, she cannot, by convention, refuse to assent to any such Bill on any grounds.[168] The court went on to say:[169]

> 'We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld the courts would be bound to enforce the law, not the convention. They would refuse to recognise the validity of a vetoed bill.'

The court noted that although the remedy for breach of convention does not lie with the courts, alternative means are available to deal with any violations.[170] Other institutions of government could provide a remedy, although it would not be a formal remedy, and it might be administered with less certainty or regularity than it would be by a court.[171] This line of reasoning was explained further in terms which Jennings might have greatly appreciated.[172]

> 'It is because the sanctions of convention rest with institutions of government other than courts, such as the Governor General or the Lieutenant-Governor, or the Houses

> of Parliament, or with public opinion and ultimately, with the electorate that it is generally said they are political.'

The court referred to a substantial body of case law in order to discover whether or not a convention has ever 'crystallized' into law.[173] It concluded that no such crystallization or transformation of conventional rules has ever taken place.[174] The whole notion of crystallization overlooks the fact that conventions are political in character and exist merely because they enjoy political recognition by those for whose benefit or detriment they were developed.[175] The concept of crystallization would imply that there is a 'common law of constitutional law' whose origins can be traced in political practice.[176] The court utterly rejected this notion, however,[177] and it sought to distinguish any examples of such crystallization which have occurred in the context of 'International Law.'[178] As far as conventions relating to internal self-government are concerned, the court took the view that:[179]

> 'The attempted assimilation of the growth of a convention to the growth of the common law is misconceived. The latter is the product of judicial effort, based on justiciable issues which have attained legal formulation and are subject to modification and even reversal by the courts which gave them birth when acting within their role in the state in obedience to statutes or constitutional directives. No such parental role is played by the courts with respect to conventions.'

The courts approach to the relationship between law and convention may have been influenced by Hart's notion of primary and secondary rules.[180] The absence of any 'system'

to conventional rules is highlighted by the judgment on a number of occasions.[181] The opinion of the majority in this Supreme Court case would appear to have rejected Jennings' perspective on the dichotomy of law and convention. The learned judges seem to have accepted that there are certain fundamental differences between the basic character of laws and the basic character of constitutional conventions. These differences would seem to extend far beyond the question of judicial enforceability.

At one stage in his attack on Dicey, the court-enforcement test was dismissed by Jennings as important only for a lawyer who accepted the idea that law is 'enforced' in courts.[182] The decision in Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3) would suggest that judges are indeed lawyers who take court-enforcement of law rather seriously.

VII. THE DICHOTOMY OF LAW AND CONVENTION : CONCLUSIONS

(1) The court-enforcement test

Dicey believed that law and convention are separate and distinct. The litmus-test of this distinction is his court-enforcement criterion. He argued that a legal rule may be enforced by the courts, whereas a conventional rule is incapable of judicial enforcement. The test has been subjected to considerable criticism from Jennings. It was argued by Jennings that the courts have blurred the distinction between legal and conventional rules. The test has been vigorously defended by Munro, however, and it has recently been upheld as a valid test by the Supreme Court of

Canada. It can be concluded that the judgment of the Canadian court is eloquent testimony to the esteem with which Dicey's test is still viewed.

(2) The relationship between law and convention

Although the court-enforcement test might appear to be somewhat arbitrary, it must be understood in the context of the wider relationship between law and convention. The biggest criticism that can be directed at Dicey was his failure to explore the full ramifications of the relationship between legal and conventional rules. Dicey appeared to be completely preoccupied with exposing the reasons for obedience to the non-legal rules of the constitution. No systematic attempt was made, however, to explain why these rules are attributed with a non-legal character. The assertion that they are non-legal because they are not enforced by the courts leaves many questions unanswered about the basic nature of such rules.

Jennings believed that law and convention are inextricably linked. Like Dicey before him, he concentrated on an exposition of the reasons for obedience to both categories of rule. Certain aspects of Jennings' analysis are extremely enlightening. He demonstrated the importance of political factors in securing obedience to conventional rules. There can be no doubt that this aspect of his analysis continues to hold considerable authority. Some of Jennings' other contentions, however, may now be seriously questioned. He tried to argue that law and convention are

more or less the same, because both categories of rule are based on nothing more than acquiescence. In another, closely related contention, he tried to undermine the strength of Dicey's court-enforcement distinction. He attempted to do this with reference to cases which demonstrated the courts increasing involvement with a combination of legal and conventional rules. Both of these contentions have now been decisively rejected.

Munro may be attributed with the exposure of the weaknesses in Jennings' arguments. He has demonstrated that Jennings, like Dicey before him, fell into the trap of over-emphasising the role of sanctions as a means to categorize legal and conventional rules. Munro referred to Hart's model of a legal system, and thereby demonstrated the fundamental differences between law and constitutional convention. Regardless of whether or not they rest on acquiescence, Munro has been able to show that there are considerable differences between the two types of rule. He has argued persuasively that conventional rules operate out-with any coherent 'system'. This is because they lack any of the secondary or ancillary rules which are intrinsic to a developed system of law. The fundamental differences which he exposed would suggest that the judicial enforceability of conventional rules is an extremely remote prospect.

The decision of the Canadian Supreme Court in Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3) would seem to confirm that Munro's approach to the

relationship between law and convention is to be favoured over those of his predecessors. The court's analysis of the distinctive characteristics of the two categories of rule bears a striking resemblance to the approach which Munro has adopted. The court has emphasised that conventions are political rules, both in terms of their origin and their purpose. The political character of conventions, their fundamental irreconcilability with many of the formal legal rules of the constitution, and their absence of any coherent 'system' has meant that it is inopportune for any court of law to give direct effect to conventional rules.[183]

There can be little disagreement with the Canadian Supreme Court's observation that 'constitutional conventions plus constitutional law equal the total constitution of the country.'[184] This does not mean that a court of law can and will enforce convention. A political rule cannot be equated with a legal rule. Political rules are an entirely inappropriate subject for judicial interpretation and enforcement.

CHAPTER VII

THE ENFORCEMENT OF CONVENTIONS IN SOUTH AFRICA

I. INTRODUCTION

The previous chapter has examined the relationship between law and convention in an overwhelmingly British constitutional context. Munro's perspective on the subject transcends national barriers, however, and the recent decision of the Canadian Supreme Court has relevance for all countries with Westminister-style systems of government.[1] Accordingly, many of the observations which have been made in Chapter VI about the fundamental differences between law and convention do not have to be repeated in the present chapter in a specifically South African context.

It is to be noted, however, that both Dicey and Jennings have analysed the sanctions which safeguard obedience to convention with exclusive reference to the position under the British constitution. Obviously, the legal factors which might inhibit a breach of convention cannot be assumed to transcend all national barriers. The same can clearly be said about political factors as well. Although South Africa and the other former Dominions of the British Crown inherited the basic patterns of Westminister government, it cannot be assumed that political conditions in each of these countries would replicate the domestic political circumstances of the United Kingdom.

South Africa's steady drift away from the Westminister pattern of government[2] makes a thorough investigation of all factors which secure obedience to conventional rules all the more urgent and necessary. Dicey's exposition of the legal forces which

safeguard continued respect for conventional rules will therefore be examined within the framework of South Africa's own system of law. Once this has been achieved, the emphasis which Jennings placed on certain political factors will be investigated from a purely South African perspective.

II. DICEY : A SOUTH AFRICAN EXCURSION

Dicey has illustrated that the British Parliament's control over 'the Purse and the Sword' has ensured that it always has the ultimate legal powers at hand to safeguard government respect for convention. The controls are comparatively simple. No public revenues may be appropriated by the government without the authority of an Act of Parliament.[3] No taxes may be levied without parliamentary assent,[4] and no armed forces can be lawfully maintained without regular legislative authorisation.[5] The question whether or not these controls have existed in South Africa forms the basis of the following investigation. All references are being made to the legal position which existed under the two previous, 'Westminister' style constitutions of the country. Any legal changes which have occurred since the enactment of the current 'tri-cameral' constitution of South Africa are beyond the scope of this present work. It is to be hoped, however, that the theme of this particular chapter will lay the foundations for future investigation by other researchers.

(1) Control of Finance

(a) The appropriation of Public Revenues

(i) The position under the Union constitution of 1909

The South African Parliament has always enjoyed legal control over the expenditure of public revenues. The matter was originally regulated in ss 117 and 120 of the South Africa Act of 1909.[6] S 117 provided:

> 'All revenues, from whatever source arising, over which the several Colonies have at the establishment of the Union power of appropriation, shall vest in the Governor-General-in-Council. There shall be formed a Railway and Harbour Fund, into which shall be paid all revenues raised or received by the Governor-General-in-Council for the administration of the railways, ports and harbours, and such fund shall be appropriated by Parliament to the purposes of the railways, ports, and harbours in the manner prescribed by this Act. There shall also be formed a Consolidated Revenue Fund, into which shall be paid all other revenues raised or received by the Governor-General-in-Council, and such fund shall be appropriated by Parliament for the purposes of the Union in the manner prescribed by this Act, and subject to the charges imposed thereby.'

S 120 provided:

> 'No money shall be withdrawn from the Consolidated Revenue Fund or the Railway and Harbour Fund except under appropriation made by law.'

Accordingly, the South African government was not legally entitled to spend any of the moneys which accrued in the Railway and Harbour Fund or the Consolidated Revenue Fund without prior parliamentary authorisation for the necessary withdrawals. This authorisation was granted with the enactment of the Appropriation Act.[7] Parliament made sure, however, that a financial 'carte blanche' was not presented

to the government. An Appropriation Act would only authorise withdrawals from each of the two funds for the duration of the relevant financial year.[8] The legislature's determination to establish an annual cycle of financial control over the expenditure of the government was apparent as early as 1911. The Exchequer and Audit Act of 1911 laid down in s 34 as follows:[9]

> 'No Appropriation Act shall be construed as authorizing moneys appropriated thereby to be expended in any financial year other than the financial year to which it is expressed to relate, and any moneys so appropriated which may be unexpended at the close of any financial year shall be surrendered to the Exchequer Account.'

The wording of this provision was subsequently reflected in s 33 of the Exchequer and Audit Act of 1956.[10]

(ii) The position under the 1961 constitution of South Africa

As originally enacted, the South African Parliament's control of government expenditure under the 1961 Constitution was laid down in ss 98; 99; and 100 of the Republic of South Africa Constitution Act of 1961.[11] S 98 provided:

> 'There shall be a Consolidated Revenue Fund into which shall be paid all revenues raised or received by the State President, other than revenues referred to in section ninety-nine, and such fund shall be appropriated by Parliament for the purposes of the Republic in the manner prescribed by this Act, and subject to the charges imposed thereby.'

S 99 provided:

> 'There shall be a Railway and Harbour Fund into which shall be paid all revenues raised or received by the State President from the administration of the railways, ports and harbours and such fund shall be appropriated by

> Parliament for the purposes of the railways, ports and harbours in the manner prescribed by this Act.'

S 100 provided:

> 'No money shall, subject to the provisions of the Exchequer and Audit Act, 1956 (Act No 23 of 1956)[12] be withdrawn from the Consolidated Revenue Fund or the Railway and Harbour Fund except under appropriation made by law.'

There was clearly a remarkable similarity between the financial provisions of the 1961 Constitution Act and those of the former South Africa Act. The financial provisions of the 1961 Act underwent considerable amendment, however. The Consolidated Revenue Fund, and the Railway and Harbour Fund came to be regulated by entirely separate legislation.

The Exchequer and Audit Act of 1975 converted the Consolidated Revenue Fund into the State Revenue Fund. The Act repealed ss 98 and 100 of the 1961 Constitution Act and substituted a new s 98 for both of them.[13] The amended s 98 accordingly read as follows:

> (1) 'There shall be a State Revenue Fund into which shall be paid all revenues as defined in section 1 of the Exchequer and Audit Act, 1975.'
> (2) 'No moneys shall be withdrawn from the State Revenue Fund, except in accordance with an Act of Parliament.'

The term 'revenue' was defined in s 1 of the Exchequer and Audit Act of 1975.[14] Virtually all public moneys fell within the statutory definition of the word 'revenue'. The principle exception, of course, remained the Railway and Harbour Fund.[15] It can be concluded, however, that as far

as the withdrawal of moneys from the State Revenue Fund was concerned, the requirement for parliamentary authorisation remained unchanged.[16]

Control of moneys in the Railway and Harbour Fund was removed from the 1961 Constitution Act. The excision was carried out in terms of s 13(b) of the Railways and Harbours Acts Amendment Act of 1980.[17] Thereafter, the Railway and Harbour Fund was governed by the Railways and Harbours Finances and Accounts Act of 1977[18] as amended by the 1980 Act.[19] Notwithstanding these changes, however, the effect of the original statutory rule in s 99 of the 1961 Constitution Act was retained. No moneys could be withdrawn from the Railway and Harbour Fund except in accordance with an Act of Parliament.[20] After the repeal of the Railways and Harbours Finances and Accounts Act of 1977,[21] control of moneys which had been in the Railway and Harbour Fund became regulated by the South African Transport Services Finances and Accounts Act of 1983.[22] The Railway and Harbour Fund, as such, disappeared.[23] The appropriation of money for the expenditure requirements of South African Transport Services became regulated by s 4 of the 1983 Act.[24] The effect of the original statutory rule in s 99 of the 1961 Constitution Act was still maintained, however. The need for annual appropriation by Act of Parliament remained intact.[25]

(iii) Legal control of appropriation : conclusions

The statutory provisions to which reference has been made demonstrates that Parliament remained in firm legal control

of all government expenditure in South Africa. Dicey's excursion to this country would have been successful, because 'the power of the purse' remained legally intact.

(b) The levying of taxes

The South Africa Act of 1909 was totally silent about the power to levy taxes. The 1961 Constitution Act was equally reticent in this respect. At first sight this may seem a little extraordinary, because taxation powers raise questions of great constitutional significance. The oversight may be dismissed, however, as more apparent than real. First of all it should be pointed out that, regardless of who enjoys the power to levy taxes, only Parliament may sanction the appropriation of public revenues. Legislative control of public finance is thus ensured. Secondly, it should be noted that Parliament's exclusive legal right to authorise the levying of taxes remains unchallenged. Legislative control of taxation, in other words, is unquestioned. The origin of the law relating to taxation powers may seem rather obscure. A short historical review of the legal situation is therefore required.

In England, during the mid Seventeenth century, John Hampden refused to pay 'ship money', a tax which was being levied by Charles I for the purpose of furnishing ships in time of national danger. When the Case of Ship Money[26] reached the courts, counsel for Hampden argued that the King could only levy taxes in times of actual as opposed to merely threatened emergency. The Crown conceded that the

subject could not be taxed in normal circumstances without the consent of Parliament, but contended that the King was the sole judge of whether an emergency justified the exercise of his prerogative power to raise funds to meet a national danger. The Court of Exchequer gave judgment for the King.[27] The decision created a political storm.[28] By the time the dust had settled, one King had been beheaded, and another had fled into exile.[29] Exclusive parliamentary control over the levying of taxes was finally and conclusively established in 1689. In that year the Bill of Rights was enacted.[30] One of its most crucial provisions was 'article' 4, which declared:[31]

> 'That levying money for or to the use of the Crowne by pretence of prerogative without grant of Parlyament for longer time or in other manner then the same is or shall be granted is illegall.'

Although the legal position in England had now become perfectly clear, the extent of the King's prerogative power to levy taxes in conquered territories was unsettled. In Calvin's Case[32] it was declared that if a King comes to a Kingdom by conquest, he may at his pleasure alter and change the laws of that Kingdom.[33] The extent of the King's power over conquered territories was graphically explained by Lord Mansfield in the case of Campbell v Hall.[34] He said:[35]

> 'It is left ... to the King's authority to grant or refuse a capitulation : if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks

> proper ... These powers no man has ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.'

Lord Mansfield's judgment went on to describe the legislative powers which were enjoyed by the King.[36] Clearly, in a conquered territory, the King was entitled to impose taxes through an exercise of his prerogative powers. The judgment acknowledges the right of the King to do this.[37] A difficulty arises, however, because Lord Mansfield acknowledged that Englishmen had no special privileges distinct from indigenous inhabitants of a conquered territory.[38] How could an Englishman suffer taxation at the hands of the King in a conquered territory if one of his basic liberties was freedom from such taxation in England?[39] Notwithstanding these difficulties, however, the case of Campbell v Hall has great constitutional significance for South Africa.

Lord Mansfield decided that the King irrevocably lost his prerogative power to legislate for the conquered island of Grenada once he had promised a legislative assembly for its inhabitants.[40] Accordingly, he decided that the King's attempt to tax by way of prerogative was invalid, because all of the King's tax-raising powers had been transferred to the new legislative body.[41] The Cape was annexed by the British in 1806.[42] Whether or not the King had sufficient prerogative power to tax the inhabitants of the Cape is not clear.[43] On the basis of the decision in Campbell v Hall, however, any suggestion that the King was invested with such

power was dispelled as soon as a legislative assembly was established for the colony.

Representative[44] and responsible government[45] had already been established in the South African colonies prior to the creation of the Union in 1910. Accordingly, it can be assumed that the application of Lord Mansfield's judgment was appreciated in South Africa, and that the enactment of an equivalent statutory provision was regarded as unnecessary. VerLoren Van Themaat has argued that the establishment of representative government included the acceptance of the fundamental English liberties contained in Magna Carta, the Petition of Right, Habeas Corpus, and most significant of all, the Bill of Rights.[46] This would suggest that Article 4 of the Bill of Rights is part of South African law. The weight of evidence would seem to suggest that only the South African Parliament can levy taxes in this country.

Parallels with the position in the United Kingdom are obviously close. The nature of the controls which have been established by Parliament differ little in substance between the two countries. In the United Kingdom, the tax-collecting machinery is governed by permanent statute, while the rates of income tax and corporation tax are set by Parliament every year in the Finance Act.[47] The nature of the legislative controls in this country have become much the same. The first Act which imposed a tax on general income in South Africa was the Income Tax Act of 1914.[48]

S 4(1) of the 1914 Act declared:

> 'There shall be charged, levied, and collected throughout the Union for the benefit of the Consolidated Revenue Fund ... an income tax at the rates and calculated in the manner specified hereunder, in respect of any taxable income.'

S 4(2) of the Act defined the term 'taxable income', and in the process it confirmed the purely annual nature of the tax levy. S 4(2) said:

> ' "Taxable income" shall mean an income exceeding one thousand pounds, which has been received by, or has accrued to or in favour of, any person wheresoever residing, from any source whatever in the Union, during the twelve months ended the thirtieth day of June, 1914.'

The Income Tax Act of 1915 imposed an income tax on 'taxable incomes' for the period between 1st July 1915 and 31st March 1916.[49] An Income Tax Act was again passed in 1916,[50] to be followed by a consolidating measure, the Income Tax (Consolidation) Act of 1917.[51] The 1917 legislation confirmed that a tax on incomes would be levied on an annual basis by successive statutes. S 5(1) declared:

> 'There shall be charged, levied and collected throughout the Union for the benefit of the Consolidated Revenue Fund, an income tax ... in respect of the taxable income ... received by or accrued to or in favour of any person during the year ending the thirtieth day of June 1917.'

S 5(2) declared:

> 'If for any year thereafter the levying of an income tax is authorized by Parliament the provisions of this Act shall apply, except in so far as it may be amended.'

The established pattern of annual statutes was altered in

1925, however. The Income Tax Act of 1925[52] created a permanent legislative basis for the collection of taxes on income. The key provisions of the Act were contained in s 5(1) & (2), which declared as follows:[53]

> S 5 (1) 'There shall be charged, levied and collected annually throughout the Union for the benefit of the Consolidated Revenue Fund, an income tax ... in respect of the taxable income ... received by or accrued to or in favour of any person during the year of assessment ending the thirtieth day of June 1925, and each succeeding year of assessment thereafter'
>
> (2) 'The rates of tax chargeable in respect of each such succeeding year of assessment shall be fixed annually by Parliament, but the rates fixed by the Act for the year of assessment ending the thirtieth day of June, 1925, and the rates fixed by any Act of Parliament in respect of any subsequent year of assessment shall be deemed to continue in force until the next such determination of rates ...'

Parliament was required to fix the rate of tax every year, in other words, but if a new rate had not been determined by the start of the next year of assessment, the old rate would continue in force. Parliament could not neglect to fix the rate of tax indefinitely however. Authority to collect taxes on the basis of a rate which had been fixed for the previous year would only last for the duration of one year of assessment. A delay in fixing the rate which lasted any longer than the first year of assessment for which no rate had been determined would result in the termination of the Commissioner's authority to calculate the taxes which were due. This is apparent from the wording of s 5(2), which went on to declare:

> '...the rates fixed by any Act of Parliament in respect

> of any subsequent year of assessment shall be deemed to continue in force until the next such determination of rates and shall be applied for the purpose of calculating the tax payable in respect of any taxable income ... during the next succeeding year of assessment if, in the opinion of the Commissioner, the calculation and collection of the tax chargeable in respect of such taxable income cannot be postponed until after the rates for that year have been determined without risk of loss of revenue...'

S 5(2) of the 1925 Act may therefore be regarded as an early legislative example of the Provisional Collection of Taxes Act, which was enacted by the British Parliament in 1968 to overcome the legal difficulties associated with the delay in the passage of its annual Finance Act.[54] The South African statute which presently governs a tax on income is the Income Tax Act of 1962.[55] It repeats the pattern which was established in 1925. Income tax is paid annually for the benefit of the State Revenue Fund, [56] and the rate of tax is to be fixed annually by Parliament.[57] Like the 1925 Act, it provides that the rates fixed by Parliament in respect of any one year of assessment or financial year shall be deemed to continue in force until the next such determination or variation of rates.[58] The rate which Parliament has fixed for one year may therefore be used, temporarily, to calculate the tax payable for the next succeeding year.[59] As Parliament is obliged to fix the rate of tax on a strictly annual basis, however, the rate for any one year is determined long before the end of the year of assessment or financial year concerned.[60]

The statutory provisions to which reference has been made demonstrates, when combined with the dictum of Lord

Mansfield in Campbell v Hall, that Parliament remained in firm legal control of the taxation power in South Africa. It can be confirmed, once again, that Dicey's contentions have considerable force in South Africa. Control of both the taxation power and the appropriation of public revenues clearly illustrates that Parliament retained a tight legal grip on the public finances of this country.

(2) Control of the armed forces

In South Africa, there is no equivalent of the British Army (Annual) Act or its modern successors.[61] The South African armed forces enjoy permanent statutory authorisation, unlike the armed forces of the United Kingdom. A proper appreciation of the legal position of the armed forces in this country requires some knowledge of the historical and past legal background of these forces.

In the mid to late nineteenth century, Imperial forces were still used in the self-governing colonies of the British Crown to ensure both internal tranquility and protection against foreign attack.[62] In 1862, however, the House of Commons had already resolved that, while it was recognized that all parts of the Empire must have Imperial assistance against danger resulting from Imperial policy, as far as was possible the responsibly governed colonies should bear the expenses of their own internal defences.[63] It was also resolved that such colonies ought to assist in their own external defence.[64] The Cape Colony already had its own Colonial forces in the 1870's, and much friction

resulted between the Governor of the colony and the Molteno ministry about the deployment of these forces in the frontier wars.[65] At one stage the dispute between the Governor and the Cape colonial government about control of these forces threatened the existence of 'responsible government' at the Cape.[66]

At the time of Union in 1910, legal authority for the colonies to set up their own armed forces was set out in S 177 of the Army Act of 1881.[67] This Imperial Act applied to the whole of the British Empire,[68] and it is doubtful if the establishment of armed forces in South Africa would have been successful without this Act.[69] Two, inter-related reasons may be given for this assertion. Firstly, the Bill of Rights of 1689 is an inherent part of South African constitutional law. Accordingly, the maintenance of a standing army through the exercise of the Royal Prerogative would have been contrary to law. Secondly, the South African Parliament was a colonial legislature, which meant that none of its enactments could have extra-territorial effect. A sound statutory basis for local armed forces would have required legislation to enable these forces to be deployed beyond the immediate frontiers of the country.

(a) The Bill of Rights of 1689

It has already been noted that VerLoren Van Themaat regards the Bill of Rights of 1689 as an inherent part of South African constitutional law.[70] The English theory of the general law of the colonies so far as they had been

settled was simple.[71] The common law of England was the common law of the plantations, and all statutes in affirmance of the common law passed in England antecedent to the settlement of any colony were in force in that colony.[72] The theory also provided that no English statute passed since the establishment of a colony would be in force there unless it specifically mentioned the colony in question.[73]

It needs to be emphasized that the Cape Colony was a conquered colony, and the Roman-Dutch laws of the Cape were retained largely intact.[74] There can be little doubt, however, that English law was received at the Cape to the extent that it determined the authority of the King and the British Parliament in the colony.[75] The importance of English law, and its relationship with the indigenous Roman-Dutch law is best summed up by VerLoren Van Themaat as follows:[76]

> 'In die eerste plek berus ons staatsreg op die Engelse staatsreg. Die Engelse staatsreg het die gesag van die Koning en die Engelse Parlement oor die gebiede wat later die Unie gevorm het, bepaal, en die omvang en perke daarvan omskryf. Op grond van 'n reël van Engelse staatsreg het die Romeins-Hollandse reg in die gebiede wat later die Unie gevorm het, gegeld in alle gevalle waar die hoogste gesag van die Koning en Parlement nie in die gedrang gekom het nie. Die Romeins-Hollandse reg was ook van toepassing op daardie prerogatiewe van die Koning wat nie voortgespruit het uit die gevolgsverhouding nie, maar te doen het met ou feodale, privaatregtelike of prosesregtelike voorregte van die Kroon.'

In England, the right of the King to maintain a standing army by virtue of his Royal Prerogative was declared contrary to law in 1689. The Bill of Rights of 1689

'article' 6 declared:

> 'That the raising or keeping a standing army within the Kingdome in time of peace unless it be with consent of Parlyament is against law.'

To the extent that English statute law has been received in South Africa, it may be asserted that article 6 of the Bill of Rights is part of South African constitutional law. The military prerogative is closely tied up with the King's legal and political authority, and it is inconceivable that this matter would have been governed by the rules of Roman-Dutch law. The Bill of Rights was enacted in 1689, more than a century before the Cape was annexed by the British in 1806. Accordingly, it is suggested that the military prerogative was carried to the Cape in the truncated form which had resulted from enactment of the Bill of Rights. This, of course, may seem to be inconsistent with the extensive rights of the King in territories which he had conquered.[77] It was noted by Lord Mansfield in Campbell v Hall, however, that the King's legislative authority in conquered territory had to be exercised in accordance with 'fundamental principles'[78] These 'fundamental principles' were not specified,[79] but it is suggested that these principles would have included the basic provisions of the Bill of Rights. In the absence of a local colonial legislature, it is suggested, therefore, that the King would only have been able to maintain colonial forces with the consent of the Imperial Parliament.[80]

Regardless of what the position may have been when the

Cape was annexed in 1806, however, there can be little doubt that control of the military prerogative passed to the Cape colonial legislature after the establishment of representative government in 1850. In Campbell v Hall Lord Mansfield had said in relation to conquered territory that the King's legislative and taxation powers would vest in the local legislature once representative government was introduced.[81] The rights of the conqueror were thereby eliminated, so that his powers in the new possession would be the same as in other settled colonies.[82] Similarly, control of the military prerogative must have vested in the local legislature,[83] and the principles of the Bill of Rights must have been incorporated into the colony's laws. Unless this can be asserted, the prerogative rights of the King in a colony which had been acquired by conquest since 1689 would have remained greater than his prerogative rights in a colony which had been acquired by way of settlement after that date.[84] This, it is suggested, would have been contrary to the basic reasoning behind Lord Mansfield's judgment. Accordingly, while the position in the Cape may have been confused prior to 1850, it is contended that the Bill of Rights became rooted in all the South African colonies once a system of representative government was received by them.

Consequently, it may be said that after the foundation of the Union of South Africa, the creation and maintenance of South African armed forces required the enactment of

legislation passed by the Union Parliament. An exercise of the Royal Prerogative would have been contrary to law.[85]

(b) Extra-territorial limitations to South African legislation

The creation and maintenance of armed forces by South African legislation had its difficulties, however. The South African Parliament of 1910 was a colonial Parliament, and it was subject to all the usual restrictions and limitations of a colonial legislature.[86] One of these restrictions was its inherent inability to enact legislation with extra-territorial effect.[87] The restriction was somewhat obscure in origin, but it amounted to more than a mere rule of construction for the interpretation of s 59 of the South Africa Act of 1909.[88] The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation of 1929 had noted:[89]

> 'But in the case of the legislation of Dominion Parliaments there is also an indefinite range in which the limitations may exist not merely as rules of interpretation but as constitutional limitations... The subject is full of obscurity, and there is a conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent.'

The uncertainty associated with this restriction was a considerable, practical handicap to the South African legislature. Effective armed forces could not be created for the Union, because it would not be possible to deploy them beyond the frontiers of the country. Legal uncertainties would have abounded. The efficiency of the local military machine would thereby be seriously brought

into question.

Imperial legislation was therefore vital, if South Africa's armed forces were to enjoy the capacity to act beyond the borders of the Union. It is in this context that s 177 of the Army Act of 1881 is so important.[90] Legal authority to operate extra-territorially could only be given by Imperial legislation.

(c) The Defence Act of 1912[91]

Armed forces were established for the Union by the Defence Act of 1912. Although it was not immediately apparent in the 1912 Act, the Union Defence Force was dependent on annual legislation. To a certain extent it can be said that the statutory pattern in South Africa reflected the statutory position of the armed forces in the United Kingdom. The annual legislation which was required had to be enacted by the Imperial Parliament, and the South African legislature had no part to play in this process. Two closely related reasons may be offered to explain the dependance of the Union Defence Force on annual Imperial legislation. Both of these were connected with the problem of extra-territoriality.

1. S 123 of the Defence Act of 1912 was the key provision which enabled the statute to operate with extra-territorial effect. S 123 declared:[92]

> 'By virtue of the provisions of section one hundred and seventy-seven of the Army Act, this Act shall extend to all members of the Defence Force of the Union whether

serving within or outside the Union ...'

The term 'Army Act' was defined in s 124 of the 1912 Act as follows:

> ' "Army Act" shall mean the Army Act of the Parliament of Great Britain and Ireland as amended from time to time.'

This was clearly a reference to the Army Act of 1881.[93] As the South African Parliament could not legislate with extra-territorial effect, it could not give itself this power through its own legislative enactments.[94] This could only be granted by the Imperial Parliament itself. S 177 of the Army Act of 1881 gave the colonial Parliaments the legislative competence to create and maintain armed forces which could operate beyond immediate colonial borders.[95] Accordingly, s 123 of the Defence Act of 1912 was competent to operate with extra-territorial effect only because it was given this ability by s 177 of the 1881 Imperial Act.

The Army Act of 1881, however, was dependent for its continued validity on annual 'renewal' legislation. S 191(1) of the 1881 statute subjected the whole of the Army Act to annual renewal by the Army Discipline and Regulation (Annual) Act and its successors.[96] A failure on the part of the British Parliament to pass on annual Act would have resulted in the lapse of the Army Act of 1881. Its expiry would not have been restricted to the United Kingdom, however. It would have lapsed throughout the British Empire and in all other places where it might have been in force. The expiry of the Army Act would have meant the expiry of

s 177 of the 1881 Act. The immediate consequence of this expiry would have been the loss of the Union Defence Forces' capacity to operate on an extra-territorial basis. Considerable problems might well then have ensued.

2. S 95 of the Defence Act of 1912 incorporated the British Military Discipline Code into the law of South Africa as the Union Military Discipline Code. S 95 declared:[97]

> 95(1) 'By virtue of section one hundred and seventy-seven of the Army Act, the provisions of that Act shall apply in relation to the Defence Forces of the Union and to all officers, non-commissioned officers and men thereof -
> (a) save and except the portions of the said Act which are mentioned in the Fifth Schedule to this Act; and
> (b) subject to such adaptions and modifications as the Governor-General may and is hereby authorized from time to time to make to the remaining provisions of the said Army Act and to the rules of procedure made under section seventy thereof ...
> (3) The said remaining provisions and the said rules, as adapted and modified from time to time under this section, may be cited for all purposes as the Union Military Discipline Code.'

Consequently, the effect of s 95 was to create a Union Military Discipline Code. The code was partially created by the adoption of relevant sections of the Imperial statute, namely those provisions of the Army Act of 1881 which governed the military discipline of the Imperial forces.[98] There was one apparent difficulty with the adoption of an Imperial Act, however. Although the South African Parliament could adopt the Army Act, it could not give that

statute any extra-territorial effect. This meant that although the Union Military Discipline Code would have had full legal force within the Union, its validity elsewhere would have been open to doubt. S 177 of the Army Act of 1881 overcame this apparent difficulty, however, because it authorized the colonies to make certain laws which would have extra-territorial effect.[99] South Africa was therefore able to adopt provisions from the Imperial Act and through s 177 give them extra-territorial application. The end result of all this ensured that South African forces would remain subject to the Union Military Discipline Code when they operated beyond the frontiers of the country.

It is obvious that the Union Military Discipline Code was largely the product of an Imperial Act. This created potential problems for South Africa. The difficulty stemmed from the fact that the Army Act needed annual renewal by the Imperial Parliament,[100] and doubts could have arisen about the validity of the Union's Discipline Code if the necessary renewal had not been forthcoming.[101]

(d) The armed forces : termination of annual renewal

After the enactment of the Statute of Westminister of 1931,[102] the South African Parliament was given the power to legislate with extra-territorial effect. The power granted was framed in general terms, which meant that the Union legislature would no longer have to rely on specific Imperial Acts if it wanted South African legislation to extend beyond the frontiers of the country. Dependence on

Imperial statutes such as the Army Act of 1881 and all the subsequent annual renewal legislation was therefore no longer absolutely necessary.

Consequently, the South African Parliament almost immediately enacted a statute to terminate the dependence of its Defence Act on Imperial legislation. The South African statute which cut the links with the Army Act of 1881 was the Defence Act (Amendment) and Dominion Forces Act of 1932.[103] The key provision of this 1932 statute was s 4 which laid down:

> 'Section one hundred and twenty-three of the principal Act is hereby amended by the deletion of the words "By virtue of the provisions of section one hundred and seventy-seven of the Army Act." '

The effect of this provision was to make the Defence Act of 1912 operate in its own right without any reference to the Army Act of 1881.[104] The Union Defence Force could thereafter operate both within the country and beyond its borders by virtue of legislation which was exclusively South African in origin.[105] The other important provision of the 1932 statute was s 2(1), which declared:

> 'The provisions of the Army Act, 1881 (44 & 45 Vict C 58) of the United Kingdom as amended from time to time up to the commencement of this Act, and the rules of procedure made under section seventy thereof, as adapted and modified under section ninety-five of the principal Act, which by virtue of section ninety-five of the principal Act, comprise, at the commencement of this Act, the Union Military Discipline Code, shall, notwithstanding the repeal of section ninety-five of the principal Act by this Act ... continue to apply in relation to the Defence Forces of the Union and to all members thereof, subject to such adaptions and modifications as the Governor-General may, by notice in the Gazette, make thereto'.

Accordingly, the Union Military Discipline Code, which had been governed largely by the provisions of Imperial statute was incorporated into South African law. Any future amendment by the Imperial Parliament of the Army Act of 1881 would no longer effect South Africa's own military discipline code. The abolition of s 95 of the Defence Act of 1912 meant that the Imperial connection had been permanently cut.

The termination of dependence on the Army Act of 1881 had become a practical necessity after enactment of the Statute of Westminister in 1931. Two reasons can be suggested for the rapidity with which the links were broken. Firstly, the relationship between the Defence Act of 1912 and the army legislation of the Imperial Parliament was inconsistent with the whole spirit of equality of status which had been developing since 1926.[106] Secondly, the Union's continued dependence on the passage of an Army (Annual) Act by the Parliament of the United Kingdom would have meant that the clumsy 'request and consent' procedure would have been needed on a regular basis.[107]

The end result of the Defence Act (Amendment) and Dominion Forces Act of 1932 was to place South Africa's armed forces on a permanent legislative basis. There is no longer any need to resort to annual renewal acts or other similar devices to ensure their domestic and extra-territorial statutory validity. The present legislation governing the armed forces of South Africa is to be found in the Defence

Act of 1957.[108] The current law makes no reference to the need for periodic renewal of the principal Act, either by the South African or any other Parliament. Whether or not this departure from long-held constitutional tradition is desirable may be regarded as a moot point. In 1780, Edmund Burke commented bitterly about the Irish Parliament's decision to pass a Perpetual Mutiny Bill:[109]

> 'This scene of shame and disgrace has, in a measure, whilst I am speaking, ended by the perpetual establishment of a military power in the dominions of the Crown (the Irish Perpetual Mutiny Act) without the consent of the British Legislature, contrary to the policy of the Constitution, contrary to the declaration of rights, and by this your liberties are swept away along with your supreme authority'.

Edmund Burkes' reaction may be regarded as a little extreme and induced by the political passions of the time. In the North American colonies during the period of British rule, the colonists lacked the benefits of the Bill of Rights.[110] Each Governor enjoyed the Military Prerogative by virtue of his Commission, which meant that local armed forces could be raised in America without local legislative authorization.[111] Keith has observed, however:[112]

> '... the military prerogative was wholly useless without the support of the legislature. It was impossible to train troops without funds, which had to be voted, and it was equally impossible to manage them without penal provisions. Hence legislation was constantly resorted to ... This need of law and of finance gave the Assemblies an enormous power; New York and New Jersey insisted on Annual Acts, and did not even always pass them ...'

The key to Parliamentary control of the Army is, and

always has been, finance. The armed forces of colonial America, Britain and South Africa were as dependent on the receipt of public revenues as any other government-related service. In Britain and South Africa this situation does not appear to have changed. Parliament has exclusive control of finance. No taxes can be raised except through legislative enactment, and no supplies may be appropriated without the relevant Act of Parliament. The Army is, therefore, as dependent on Parliament as any department of State. The denial of funding by Parliament would have the same crippling effect on the armed forces of South Africa as it would on any other recipient of public revenues.

(3) Dicey's South African excursion : some conclusions

The sanctions which Dicey believed would secure respect for the conventions of the constitution are not exclusive to the United Kingdom. Ultimate legal control of 'the purse' is enjoyed by Parliament, both in South Africa and the United Kingdom. The constitutional position of the armed forces in the two countries, however, are not identical. The British Parliament retains the 'power of the sword' because legislation governing the armed forces has to be renewed every five years. In South Africa this power has never really existed, and any semblance of Parliamentary control was ended when the 1932 legislation was passed. Accordingly, if the South African government chose to disregard an important conventional rule, Parliament could

not follow its British progenitor and wait for the armed forces legislation to lapse. Its only weapons are to refuse further authorisation of government expenditure, or to neglect to fix the rate of tax on incomes over a substantial period of time.

III JENNINGS AND THE SOUTH AFRICAN ENIGMA

Jennings vigorously attacked the notion that the force of law safeguards obedience to convention. Although he believed that law and convention are obeyed for the same reason, in neither case could obedience be explained in terms of fear of the courts of law. Jennings thus became a principal opponent of Dicey's analysis of the relationship between legal and conventional rules. He proceeded to attack Dicey on three separate grounds:

(a) Time-lapse; he noted that there may be a considerable delay between the breach of a conventional rule and any concomitant breach of the law.

(b) Loans; he noted that the British government may circumvent Parliament's refusal to authorize taxation by resort to loans.

(c) Conventions unsupported by law; he noted that the breach of certain conventions would not lead automatically to a breach of the law. He concluded that these conventions, and many others are obeyed because of the political difficulties which would follow if they were not.

Each of these headings must now be examined in a South

African context.

(1) Time-lapse

Jennings' remarks about time-lapse have already been criticized in the previous chapter.[113] Little more needs to be said. The relevance of his remarks in a South African context can be seriously doubted. The criticism of Jennings remains much the same, regardless of whether it emanates from a British or a South African perspective.

(2) Loans

Jennings noted that the British government enjoys certain loan-raising powers.[114] Similar observations may also be made about the South African government. A brief description of the loan-raising powers of the South African government is therefore required, if a full understanding of 'the power of the purse' in this country is to be attained.

Originally, the loan-raising powers of the Governor-General were somewhat restricted. He could only raise loans if this was authorized by Act of Parliament, and he could only use such loans for the purposes mentioned in any such Act. The statutory provisions which first regulated these matters could be found in the General Loans Act of 1911.[115] S 1 of this Act laid down:

> 'As often as by any law hereafter passed authority is given to raise any sum of money for the purposes mentioned in any such law, the Governor-General may, from time to time as he may deem expedient, raise such sum either by stock issued in the Union ... or by stock issued in the United Kingdom ...'

The first Act of Parliament which authorised the Governor-General to use his loan-raising powers was the Public Works Loan and Floating Debt Consolidation Act of 1911.[116] S 1 of that Act declared:

> 'The Governor-General may from time to time and he is hereby authorized to borrow in accordance with the provisions of the General Loans Act, 1911, a sum of money not exceeding in the whole the sum of four million nine hundred and seventy-four thousand two hundred and four pounds, one shilling and three pence sterling to meet the cost of the Public Works and services as set out in the First Schedule to this Act.'

S 2 authorized the Governor-General to raise a further sum amounting to just over four and a half million pounds sterling.[117] This figure represented sums which three of the constituent colonies had been entitled to borrow before Union, but which had not been raised by the time Union took effect. Parliamentary control over the loans raised in terms of this Act was further re-inforced by s 3. This latter provision laid down:

> 'No expenditure out of the sums authorized to be borrowed by the Governor-General in accordance with the provisions of sections one and two of this Act shall be incurred, unless such expenditure be authorized from loan funds by a law hereafter passed appropriating such moneys.'

It is not entirely clear that s 3 of the Act was a strictly necessary provision. S 117 of the South Africa Act of 1909 had laid down that moneys 'raised' or 'received' by the Governor-General-in-Council were to be paid into the Consolidated Revenue Fund, or the Railway and Harbour Fund.[118] Money could only be issued from either of these

two funds if the necessary authority had been granted in an Appropriation Act.[119] Although the South Africa Act did not explain whether or not there was a difference between revenues 'raised' and revenues 'received', it is submitted that revenues 'raised' was a reference to moneys which had been borrowed.[120] It is also interesting to note that according to the Exchequer and Audit Act of 1911,[121] the term 'revenues' included the proceeds of all loans raised.[122] The Act required such revenues to be paid into the 'Exchequer Account',[123] which included the Consolidated Revenue Fund of the Union.[124] Although all these statutory provisions seem to be a little confusing one thing was absolutely clear. The government was entitled to borrow money with parliamentary sanction, but further legislative approval was necessary before any of the moneys raised could be spent.

The Governor-General's borrowing powers remained largely unchanged with the enactment of the General Loans Consolidation and Amendment Act of 1917.[125] The Governor-General could only borrow money if this was authorized by Act of Parliament, and he could only spend the moneys raised in the manner sanctioned by the Act concerned.[126] A degree of flexibility was introduced, however. S 2 of the Act entitled him to borrow sums of up to three million pounds, whenever he deemed it to be desirable.[127] No expenditure could be incurred from this sum of three million pounds, however, unless it was authorized by a Loan Appropriation

Act.[128] After the enactment of the 1917 statute, the position of the Governor-General could be likened to that of the British government. This can be asserted because although he could borrow money up to a fixed amount with comparative freedom, he could not spend moneys raised except in accordance with an Appropriation Act.

The next Act which consolidated the law relating to loans was the General Loans Act of 1961.[129] The law remained basically unchanged. S 2 of the 1961 Act declared:

> 'Whenever any loan expenditure is sanctioned by any Appropriation Act, the Governor-General may borrow such sums as may, in addition to the amount at the credit of or accruing to the loan account, be required to defray such expenditure.'

Greater flexibility was introduced by the 1961 Act, however. S 3 entitled him to borrow sums of up to thirty million Rand, whenever he deemed it to be desirable.[130] The same provision also made it quite clear, nevertheless, that no expenditure could be incurred from this borrowed sum without authorization in an Appropriation Act.[131] The law which regulated the raising of government loans was subsequently contained in the Exchequer and Audit Act of 1975.[132] This Act, as frequently amended, remains the principal statute controlling public finance in this country.[133] S 2(1) lays down that all revenues are to be paid into, and all expenditure is to be defrayed from, the State Revenue Account.[134] For the purposes of the 1975 Act, the term 'revenue' includes all moneys which have been borrowed in terms of the Act.[135] As s 4(1) has laid down

that no moneys can be withdrawn from the State Revenue Account except in accordance with an Act of Parliament,[136] this means that no borrowed moneys may be spent without Parliamentary approval. The Minister of Finance has been given the authority to borrow unlimited sums of money.[137] Expenditure of these sums would still require Parliamentary approval, however.[138]

The conclusion may be drawn that since 1917, the South African government has been in a remarkably similar position to the British government. The South African government has been able to borrow money with a limited, but ever-increasing amount of freedom. This may be used to supplement any revenues raised through the tax system. One principle remains absolutely firm, however. No moneys raised through government borrowing may be spent unless this has been sanctioned by an Act of Parliament. All expenditure requires formal appropriation by the legislature, and this continues to remain the position in South Africa as much as in the United Kingdom.[139]

(3) Conventions unsupported by law

Jennings believed that a government will obey constitutional convention because of the political difficulties which will follow if it does not. He argued that the crucial factor in determining the strength of a convention is the attitude of the House of Commons to any potential breach. It is doubtful whether similar arguments could be employed in South Africa to explain continued

obedience to conventions in this country. The political culture of South Africa cannot be compared with political conditions in the United Kingdom, because there is almost a total absence of the two-party phenomenon in this country. Vorster has noted:[140]

> 'Die politieke kultuur in Suid-Afrika gee nie aanleiding tot dieselfde mate van pieëteit teenoor konvensies as in Brittanje nie en daarby beantwoord die huidige Suid-Afrikaanse omstandighede duidelik nie aan die ideaal posisie nie : een party is reeds lank aan bewind en dit skyn nie asof enige ander party geredelik aan bewind kan kom nie. Ons vind hier egter geen neiging om terug te keer na die klassieke twee-party omstandighede nie sodat hier ook nie sprake kan wees van 'n tydelike opskorting van die relevante konvensies nie ... In sodanige omstandighede verkry die beginsel van "strong government" eerder die inhoud van monopolie van beleid en die geleentheid van die opposisie om te opponeer word nie so geredelik erken nie.'

Giliomee has argued that in South Africa, elections are not decided on the basis of issues, but upon the mechanics of ethnic mobilization.[141] The National Party as a movement representing ethnic interests,[142] has managed to monopolize the reins of power in this country since 1948.[143] Although the character of the party has been changing in recent years,[144] an ethnic basis still remains. As Giliomee has said:[145]

> 'The National Party seems likely to retain its character as a tough middle class party with the Afrikaner middle-class constituting its primary political base.'

Even in 1984 Giliomee argued that the National Party's concern with ethnic power still over-rode the purely class interests of its middle-class supporters.[146] Adam has noted

that in a society where an ethnic pattern of voting assures that electoral victory will go to the dominant ethnic party:[147]

> 'The ethnic leader is not primarily judged according to the goods he can deliver, as in an interest group, but more according to how well he represents psychological group values, particularly the promise of security.'

These ethnic factors have meant that one political party has remained in a dominant position since its electoral victory in 1948. There is no 'shadow government' or 'opposition-in-the-waiting' within the recognized constitutional structures of the country.[148] Accordingly, political difficulties would not necessarily arise to confront the government if it chose to ignore existing conventional norms. Departures from constitutional convention could be justified to the electorate on the basis of group values and the search for security.

Jennings' analysis of the reasons for obedience to convention is therefore completely inadequate from a South African perspective. A fresh approach to the subject is required, and accordingly, it is suggested that reasons for obedience to convention should be examined under the next three headings.

(a) The 'Incorporated' conventions

Some of the legal provisions of the South Africa Act of 1909, and the equivalent, successor provisions of the 1961 Consitution Act, contain rules which have been built on

conventional origins. The rules contained in these provisions may be referred to as 'legalized' conventions, 'enacted' conventions, or as conventions which have been 'incorporated' into law. The conventions which have been enacted are concerned primarily with Parliament, or with the powers of the State President. Consequently, these conventional rules will be looked at under two separate headings.

(i) Parliament and 'enacted' convention

There are three rules, which are fundamentally political in character, which have been incorporated into law in South Africa. A similar process of incorporation, to a lesser extent, has also been taking place in the United Kingdom.[149] These three rules are:

1. Financial legislation is to be read the first time in the House of Assembly, and its provisions are not to be altered by the Senate.[150]

2. When there is a conflict between the two Houses of Parliament, the will of the House of Assembly must prevail.[151]

3. Ministers of State must be members of Parliament, or become such members within a specified time which is calculated from the moment of their appointment.[152]

In South Africa, there is no recorded example of the breach of these conventions. Although these rules were

incorporated into law, it is unlikely that fear of the courts induced unbroken obedience to them. There were political factors which guaranteed respect for these rules in the workings of South Africa's constitutional system. It can be argued that the fundamental characteristic of a Westminister form of government is its attachment to the principle of 'democracy'.[153] The three enacted rules safeguarded the presence of this democratic principle in the South African version of the Westminister system.[154] The rules ensured that the will of the elected House prevailed in matters concerning legislation, and they ensured that Ministers were accountable to Parliament for the implementation of government policy.[155]

These rules could not have been ignored without a taint of illegality affecting the reputation of the government. Regardless of what the attitude of the courts might have been,[156] no government would have wanted to appear to lack respect for the ideal of 'democracy'.[157] It can be assumed that if any amendment of these rules had been desired, the government would have been scrupulous to uphold established constitutional procedures. Changes would have been promoted by the introduction of legislation in Parliament. In this way any alteration of the 'democratic' character of the constitution would have been implemented through the existing democratic procedures.[158]

(ii) Executive Powers and 'enacted convention'

In chapter III it was explained that the Governor-General

of South Africa only exercised his powers on Ministerial advice.[159] Originally, the limitation on the Governor-General's freedom of action was governed almost exclusively by convention. A variety of reasons, however, which have already been discussed, contributed to the enactment of this rule in statutory form.[160]

The convention became enacted in s 4 of the Status of the Union Act of 1934.[161] S 4(1) and (2) declared:

> 4(1) 'The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of his Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative.'
>
> (2) 'Save where otherwise expressly stated or necessarily implied, any reference in the South Africa Act and in this Act to the King shall be deemed to be a reference to the King acting on the advice of his Ministers of State for the Union.'

The enactment of this provision was a purely symbolic political act. Convention had already ensured that the Governor-General would act exclusively on South African ministerial advice, and there was nothing in the 1934 legislation which added or detracted from this existing pattern of political behaviour.[162]

In practical, legal terms, the statutory rules which curtailed the Governor-General's freedom of action were to be found in the Royal Executive Functions and Seals Act of 1934.[163] The Act required the Governor-General's signature on public instruments to be confirmed with seals which were in the possession of the Prime Minister.[164] Furthermore, it

required all such public instruments to bear the co-signature of one of the Ministers of State for the Union.[165] The effect of the Act was to prevent the Governor-General from exercising his executive powers on his own initiative. Any action which he chose to take would have lacked statutory validity in the absence of a co-signature from one of his Ministers.[166] Advice given by the Prime Minister was guaranteed to be pre-eminent, however, because the Prime Minister was charged with responsibility for the seals. No attempted breach of these statutory rules has been recorded, and the absence of such breach can hardly be described as surprising. No Governor-General would have wished to besmirch his reputation with accusations of illegal conduct, or witness instruments he has signed being declared invalid by the courts. The principal reason for obedience to the enacted rule, however, could be attributed to political factors. No Governor-General would have acted without ministerial advice, because such behaviour would have violated the whole spirit of the Westminster system of government. Independent political activity would have been entirely inconsistent with the Governor-General's role as a ceremonial Head of State.[167] Similar things could be said about the role of the State President under the 1961 Constitution Act. The wording of s 4 of the Status of the Union Act was reflected in s 16 of the 1961 Constitution Act.[168] The practical, legal effect of the co-signature requirements under the Royal Executive Functions and Seals Act was repeated in s 19 of the 1961 Constitution Act.[169]

Reasons for obedience to the enacted convention remained much the same. The State President could not validly express his will unless it was accompanied by at least one Ministerial co-signature.[170] Any attempt to defy the requirements of s 19(1) would have been doomed to failure. More importantly, it would have undermined the integrity and good reputation of the State President's office. Accusations that he had acted illegally may have led to calls for his removal on grounds of 'misconduct.'[171] He would have stood condemmed for having violated the whole spirit of the Westminster constitution. The strength of these political factors is perhaps best demonstrated by the fact that B J Vorster wielded little discernible influence during his tenure of the State Presidency. The purely ceremonial nature of his position was perhaps all the more surprising because he had only recently resigned as the Prime Minister of the Republic.[172]

At this point it should be emphasized that the courts would not have enforced the enacted convention. They would not have concerned themselves with questions about whether the advice of Ministers was followed or not. All that they would have been concerned about would have been compliance with the co-signature and sealing procedures. The courts reluctance to enforce the convention in s 4 of the Status of the Union Act and s 16 of the 1961 Constitution Act would have been due to the overtly political character of these rules. The attitude of judges to the interpretation of s 13

of the South Africa Act showed a remarkable reluctance to interfere with the fluid character of Cabinet procedures.[173] Any attempt to prescribe in legal terms the exact nature of the relationship between the Cabinet and the Head of State would have got bogged down in difficulties. In strictly legal terms, the Cabinet did not even exist.[174] The court would have needed to clarify the meaning of the words 'on the advice of his Ministers.' These words were ambiguous. It might have been argued that the State President could act only on the basis of Ministerial unanimity. Alternatively, it might have been argued that he could act on the advice of a majority of existing Ministers. A court may have argued that he could have acted simply on the basis of a majority vote of Ministers who happened to be present at a particular meeting of the Executive Council. The courts would have had to determine whether or not emphasis could be placed on the express wishes of a small clique of influential senior Ministers. The court might also have been called upon to interpret the nature of the relationship between the Prime Minister and the Head of State, or between the Prime Minister and his colleagues. This would have involved the court in even greater difficulties, however, because the existence of the Premiership was not even legally recognized.[175]

Some of the executive powers which were vested in the Governor-General or the State President were never made subject to the enacted conventional rule. It would be appropriate to look at these powers under a separate

heading.

(b) Executive Powers and the unenacted conventions

Several powers which were enjoyed by the Governor-General of the Union were exempted from the restrictions of the Status of the Union Act and the Royal Executive Functions and Seals Act.[176] In strict legal theory, the Governor-General was entitled to exercise the following powers without any Ministerial advice whatsoever:

1. to appoint, summon and dismiss members of the Executive Council;[177]
2. to appoint and dismiss Ministers;[178] and
3. to summon, prorogue or dissolve Parliament.[179]

In practice, however, the exercise of these powers was restricted by the operation of constitutional convention. This has already been clearly demonstrated in Chapter III.[180] No clear example can be cited of the breach of the conventions governing these powers. The reasons for this are basically political. The Governor-General had to secure an administration which enjoyed majority support in the House of Assembly. He was rather cut-off and remote from Parliament himself, however, and thus he had to rely on the Prime Minister as the lynch-pin of the system.[181] Accordingly, these powers came to be exercised on the advice of the Prime Minister, and not by the Governor-General on his own initiative. These political factors cannot be separated entirely from legal factors, however. The

government's political dependance on the majority in the lower house was reinforced by the legislature's tight grip on public finance. A government which attempted to ride rough-shod over Parliament would have found itself without authority to appropriate supplies.[182] In 1939, Sir Patrick Duncan's refusal to accept General Hertzog's request for a dissolution of Parliament could have been regarded as a departure from the established conventional rule. It has already been argued in Chapter III however, that no breach of convention actually took place.[183] The Governor-General's actions were entirely compatible with the basic principles of a Westminster system of government.[184]

Several of the powers which were enjoyed by the State President under the 1961 Constitution Act were similarly restricted by the operation of purely conventional rules.[185] In legal theory the State President was entitled to exercise the following powers without Ministerial advice:

1. to appoint Ministers;[186] and
2. to summon, prorogue or dissolve Parliament.[187]

In practice, however, convention ensured that these powers were exercised on the advice of the Prime Minister.[188] It must be remembered that the establishment of a Republic in 1961 did not represent a departure from the basic characteristics of a Westminster system of government.[189] The constitution-makers had expected the State President to be a non-political figure, who would symbolize the dignity and pride of the nation.[190] The role of the State President

fallen into disuse. The 'suspended operation' of the two conventional rules may be attributed to the disappearance of the 'two party political system' in this country. Both of the following rules may be regarded as dormant. Whether they will ever come back to life or not is a subject for speculation.

1. When a Ministry is defeated in the House of Assembly, the government must resign or seek a dissolution of Parliament from the State President.[197]

This convention has been redundant in South Africa since the dissolution crisis of 1939. Since that time, temptations by government to disregard this convention have simply not arisen, because circumstances have not presented the government with an opportunity to test the strength and vitality of the rule. The gradual disappearance of a strong parliamentary opposition party,[198] and the extraordinary internal discipline of the National Party,[199] has meant that the prospect of government defeat in the legislature has become the remotest possibility.

2. When a Ministry loses an election it must resign.[200]

This convention has fallen into disuse since 1948. The last occasion on which it was used occurred when General Smuts resigned after losing the General Elections of 1948.[201] General Smuts had not waited until he was defeated in Parliament before he offered his government's resignation to the Governor-General of the Union.[202] Whether this convention is ever likely to revive is open to speculation.

A government which sensed that it might face defeat at the polls could be tempted to 'temporarily suspend' the holding of elections. Although this could be regarded as a desperate measure an attempt could be made to justify the cancellation of elections in terms of the security needs of the voting population.[203] It must not be forgotten that the British government resorted to such measures during the politically explosive transition from Stuart to Hannoverian rule in 1715.[204] The loyalty of the government's supporters in Parliament would mean that the cutting off of supply would be an unlikely reaction.

(d) The vague conventions

1. Collective Cabinet responsibility to Parliament.[205]

The nature of this conventional rule and the uncertainties associated with its consistent enforcement have already been examined in Chapter III.[206] The vagueness of the rule, both in a British and a South African context has been readily apparent.[207] Booysen and Van Wyk have commented:[208]

> 'Die leerstuk van ministeriële verantwoordelikheid is deel van ons Britse staatsregtelike erfenis, en soos dit in daardie stelsel nie presies seker is waar die grense van die verantwoordelikheid lê nie, is dit ook in Suid-Afrika heeltemaal duidelik nie'.

The nature and the extent of the convention is necessarily vague, because its operation depends upon the level of support enjoyed by the Prime Minister in the lower House at any given moment. This could be asserted in respect of both the British and the South African versions of the rule.[209]

The operation of Cabinet responsibility in South Africa during the disclosures associated with the Information Scandal is most enlightening in this context. Booysen and Van Wyk have said:[210]

> 'Daar was byvoorbeeld gedurende die inligtingskandaal van die sewentigejare sterk druk dat die hele kabinet van die eertydse eerste minister moes bedank omdat minstens een van hulle bewus was van onreëlmatighede. Die betrokke minister het uiteindelik bedank, maar ook nie sonder meer nie.'

During the 'Information Scandal' debate at the end of 1978, the Prime Minister, P W Botha, had re-affirmed his government's commitment to the convention of collective accountability.[211] At the same time he refused to accept the arguments of the parliamentary opposition that his government was in any way responsible for the financial irregularities in the funding of secret government projects.[212] He argued that the Cabinet knew nothing about the activities of Dr Mulder as head of the Department of Information, and that collective responsibility does not arise when the Cabinet lacks information or has had information withheld from it.[213] The respective leaders of the two opposition parties in the House of Assembly were totally unsatisfied with the Prime Minister's interpretation of the rule relating to Cabinet responsibility.[214] Both demanded the government's resignation.[215] The government, however, did not resign, and it comfortably survived the motion of 'No Confidence'.[216] The whole episode led Wiechers to conclude:[217]

> 'In die hele debakel het dit duidelik geblyk dat kollektiewe verantwoordelikheid van die kabinet afhang van die posisie en ondersteuning van die eerste minister. As die eerste minister die steun van die meerderheid in die parlement geniet, is daar geen manier om die kabinet tot kollektiewe verantwoordelikheid te roep nie.'

Accordingly, the loyalty of National Party MP's to the Prime Minister meant that the Cabinet was able to shift the blame for the Information Scandal onto individuals rather than allowing the government to take responsibility as a whole.

Once the vagueness of collective responsibility has become apparent, incontrovertible proof that it was ever violated in South Africa becomes difficult to find. Assuming that the convention was indeed dependant upon the level of support enjoyed by the Prime Minister in Parliament, there remain no objective criteria against which the behaviour of the government could be measured. Consequently, it would be misleading to attempt to analyse what Parliament or the Cabinet 'should' have done in any particular set of circumstances. All that can be done is to investigate how Parliament or the Cabinet did in fact behave in any particular situation. This leads to the conclusion that a 'descriptive' rather than a 'prescriptive' approach should be adopted in any examination of this vague conventional rule. Bearing in mind the vague, heavily political character of the convention of collective responsibility, reference to the workings of the rule in other Westminster societies can be regarded as somewhat limited in value. Booysen and Van

Wyk have observed:[218]

> 'Ministeriële verantwoordelikheid sou ten beste beskryf kon word binne die konteks van die bepaalde politieke stelsel waar dit opereer. In Suid-Afrika mag daar 'n ander soort politieke sensitiwiteit heers as in Engeland, wat maak dat ministers in Suid-Afrika onder ander omstandighede so geredelik bedank as wat ministers in Brittanje onder sekere omstandighede bedank.'

This observation is especially appropriate in view of the marked deviation of South African political conditions from those in other countries with a Westminster form of government.[219]

2. Individual Ministerial Responsibility to Parliament.

MacIntosh has suggested that in the United Kingdom, individual responsibility - like collective responsibility - operates only when and where the Prime Minister and the majority of the Cabinet want it to operate.[220] Occasionally, even if an individual Minister has blundered in some way, the government may choose to protect a Cabinet colleague from attack, and adopt collective responsibility for the actions with which he is blamed.[221] Sometimes they will decline to support such a colleague and will not collectively protect him from attack, especially if they perceive that this may endanger parliamentary support for the government as a whole.[222] Consequently, when an individual Minister has decided to remain at his post,[223] the Cabinet is presented with a choice between asserting the individual responsibility of the Minister or accepting the collective responsibility of the entire Cabinet. The course

which they adopt may depend to a considerable degree upon the degree of loyalty which they can expect from their supporters in the elected House.[224]

The apparent freedom with which the Cabinet can choose to substitute individual for collective responsibility, and vice versa,[225] would suggest that there is as much vagueness about the true nature and extent of individual responsibility as there is with regard to the more general accountability of the government to Parliament.

This vagueness may be said to extend to the convention of individual responsibility as it applies in South Africa. The impression which has been left by the Information Scandal is one of the extreme flexibility with which the Prime Minister of South Africa and his colleagues were able to apply or waive the consequences of individual responsibility.

The Erasmus Commission of Inquiry exonerated the Minister of Finance and the Minister of Defence from any culpability for the irregularities which had occurred in the former Department of Information.[226] Although they may not have been directly responsible for the irregularities which had taken place, they were attacked in the House of Assembly for their apparent failure to establish what was happening to money ostensibly under their care.[227] Neither of the Ministers resigned, however.[228] Prime Minister Botha, who had been the Minister of Defence when the Information Scandal irregularities were taking place,[229] justified his refusal to accept any degree of individual responsibility in

the following words:[230]

> 'I am a responsible member of a responsible government. I was not prepared to break with my Prime Minister or with my Government over a method of budgeting. I was not prepared to do so, and I shall not be prepared to do so tomorrow either, because I break on principles, not methods.'

The subtle distinction between 'principle' and 'method' is rather obscure, and can be regarded as even more extraordinary in view of the following observations in the Erasmus Report:[231]

> 'It is clear from the evidence that Mr P W Botha at no stage identified himself with or acquiesced in the arrangement by which funds from the Special Defence Account were transferred to the Department's secret fund. He was intuitively against this arrangement and continued to object until the arrangement was changed by legislation in 1978. It went against his grain to have to pretend to Parliament that all funds in the Special Defence Account were spent on defence activities while part of these funds went to the secret fund, even though a case could be made out for this since the secret funds were used to counter the total onslaught against South Africa.'

There is evidence to suggest that if these events had occurred in a British political context, a Minister in P W Botha's position would have felt obliged to resign.[232] At the end of the day, individual responsibility was only applied to those members of the South African Cabinet who had been directly and explicitly attacked in the two Erasmus Reports.[233]

The idea was mooted in Parliament that Dr Mulder was being used as a 'scapegoat' to protect other members of the Cabinet from the consequences of collective

responsibility.[234] It may also be argued that Dr Mulder was being used as a 'scapegoat' to protect some of his ministerial colleagues from the consequences of their own individual responsibility. Parallels may be drawn with the abandonment of Sir Samuel Hoare by the British Cabinet in 1935, when it refused to accept collective responsibility for the conclusion of the Hoare-Laval Pact.[235] The parallel would seem to indicate that the flexible use of individual responsibility in South Africa differed in no great respect from its manipulation in the United Kingdom. In both countries, the circumstances in which individual responsibility could be waived or applied would seem to have been quite fluid. It can be said that the application of the convention was heavily influenced by the level of support enjoyed by the Prime Minister and his colleagues at any given moment. A fear of loss of support for the Cabinet could always be rectified by throwing a Minister to the wolves. Once the vague and political character of the convention of individual responsibility is appreciated, a 'descriptive' rather than a 'prescriptive' approach should be adopted towards its analysis. Reference to the operation of the convention in other Westminster societies is accordingly of limited usefulness.

The idiosyncratic nature of individual responsibility in this country was perhaps best demonstrated by the events associated with the 'Biko Affair'. S Biko was the honorary President of the 'Black Peoples' Convention', who, it was

officially announced, had died in detention at Pretoria on 12th September 1977.[236] The Minister of Justice, Police and Prisons was condemned by opposition MP's in Parliament. He was criticized for the manner in which security legislation was being implemented, and for attitudes which had been expressed by certain members of the security forces in the phrase 'Ons werk nie onder statute nie'.[237] The Minister's own reaction to the death of S Biko was also heavily criticized by opposition MP's[238], and a call was made for his resignation.[239] The Minister, however, did not resign.[240] The fact that such resignation did not occur in the case of the South African Minister of Justice, Police and Prisons does not mean that the convention of individual responsibility was violated. As conventions merely reflect the political system in which they operate,[241] the continued support enjoyed by the Minister in Parliament would simply suggest that the constitutional system of this country is primarily responsive to the sensibilities of one group of people as opposed to another. In this context Dean has observed:[242]

> '...the operation of the conventions has produced executives which are primarily responsive to the needs of Whites.[243] Moreover as Afrikaans speaking Whites are politically dominant, the conventions have ensured as between Whites, South African executives have been consistently more responsive to the needs of that group.'

The refusal of the Minister to resign was a reflection of political realities in this country. Vague conventional rules such as those relating to individual and collective

responsibility must be interpreted within the framework of South Africa's distinctive political culture.[244]

(4) Jennings and the South African enigma : conclusions

Jennings believed that a government will obey constitutional convention because of the political difficulties which will follow if it does not. As far as the application of his ideas to South Africa are concerned, they must be read subject to heavy qualification. Many conventions have been consistently obeyed in this country, but it is doubtful whether this has been due to government fear of opinion in the House of Assembly. As far as the period since 1948 is concerned, conventions have been obeyed because it has been convenient to do so. They embody the spirit and practice of the Westminster system, a method of government which South Africa's political leaders were long contented to leave intact. No over-riding need for change was necessary. There would have been little to inhibit a departure from convention if this could have been justified in the name of group security or the protection of ethnic interests. No such departures were readily apparent, however, in the first seven decades of South Africa's existence.

The statutory nature of some of these rules helped to reinforce their obligatory character. A breach of these rules would have carried the taint of illegality, and no government would have wished to acquire a reputation for breaking the law. Furthermore, many of these statutory rules

helped to underpin the 'democratic' basis of South Africa's system of government. Although a departure from 'democracy' could always have been justified, the government would have been scrupulous to obey existing procedures in this process.

Some of the conventions have been more or less suspended, which means that it is impossible to judge whether they would be obeyed or not. Others are so vague in character that the question of obedience becomes bogged down with difficulties. As far as these vague conventions are concerned, it can be suggested that a descriptive rather than a prescriptive approach should be adopted in relation to obedience.

Political 'sanctions', as such, were not really present in South Africa's Westminster sytem. Jennings' ideas, therefore, were not suitable for transplant from a British to a South African political setting. His ideas were unable to take account of the unique political climate of this country.

IV. THE ENFORCEMENT OF CONVENTIONS IN SOUTH AFRICA : CONCLUSIONS

Conventions have been obeyed under South Africa's Westminster form of government, because no overwhelming need for breach of these rules ever arose. They amounted to self-imposed restraints on the behaviour of government - voluntary restrictions which had become part of South Africa's political tradition. Neither Dicey nor Jennings have been able to provide an adequate explanation of reasons for obedience. Ready acceptance of Dicey's ideas can be traced in the legal foundations of this country's Westminster

constitutional system. Dicey's legal sanctions have been buried under the weight of subsequent history, however, patiently waiting to be rediscovered by the 'legal archeologist'.

CHAPTER VIII

CONCLUSIONS

Until now it has been assumed by many of South Africa's constitutional writers that the conventional rules of government in this country reflect the equivalent rules in the United Kingdom. This has proved to be an unjustified assumption. It is an error to assume that conventional rules may be 'imported' from one society to another in the same manner as ordinary rules of law. Several writers have noted that certain conventional rules in this country have undergone a degree of change or adaptation which has not been experienced by their 'parent' British equivalents. This type of approach, however, begs one fundamental question - do South Africa's conventional rules owe their origin to similar rules in the United Kingdom?

This basic question can only be answered after a systematic analysis of convention in a strictly South African context. Such an approach has never been adopted in the past. Accordingly, the main objective of the preceding chapters has been to adopt a South African-based perspective to the analysis of conventions in this country. No assumptions have been made, which means it has been necessary to start at the beginning, in 1910, in order to investigate the content of these rules. In the first few decades of Union government the similarities between British and South African conventional rules were striking; but they were not the same. This has perhaps best been demonstrated by reference to the dissolution crisis of 1939. The differences, however, were not occasioned by increasing South African divergence from the

British conventional norm. The differences were the direct result of the South African character and origin of the conventional rules of this country. It has been shown that political conditions in the Union could never be an exact reproduction of political conditions existing in the United Kingdom or elsewhere. As constitutional conventions are rules which are largely political in character and origin, the whole notion that they can be the same from one country to another therefore becomes increasingly untenable.

Unfortunately, a study of the content of all possible conventional rules in South Africa is an ambitious project which extends well beyond the parameters of this current work. Strictly speaking, however, such a study is not entirely necessary for the purpose of demonstrating the indigenous character of South Africa's own conventional rules.

The preceding chapters have also attempted to investigate another long-neglected aspect of this particular subject. South Africa's constitutional system has never conformed in its entirety to all the usual hallmarks of a Westminster model of government. Until now, however, no one has attempted to investigate whether or not reasons for obedience to convention in this country are the same as reasons for obedience in other countries which have Westminster systems of government. Accordingly, the penultimate chapter has devoted a considerable amount of time to the uncovering of reasons for obedience to convention in South Africa. Parallels with the position in the United Kingdom can obviously be drawn, but this is only possible

as a result of painstaking investigation. Moreover, there can now be little dispute that reasons for obedience to convention in South Africa are not identical to reasons which have been proferred by Dicey and Jennings in a strictly British constitutional context. The ideas of both writers - especially Jennings - need readjustment to take account of South African legal and political realities. This is something which has not been appreciated or fully realized in the past.

The writer is well aware of the fact that research relating to South Africa's conventional rules has barely begun. Far more attention needs to be devoted to this particular subject by the constitutional writers of this country. It is to be anticipated that this present work has raised far more questions than it has attempted to resolve. The character and content of conventional rules under the 'tri-cameral' constitution, for example, is a matter which now calls for urgent attention. It is to be hoped that the call for further investigation in this field will be heeded in the not too distant future.

CHAPTER I

FOOTNOTE AUTHORITIES

1. Choosing an historical cut-off point is not an easy task. The date 1652 would be a logical starting point, but could the writer ignore the prior history of the Republic of the United Netherlands or of the 'Vereenigde Geoctroyeerde Oost-Indische Compagnie' (V.O.C)? The year 1910 is a convenient date; the four South African colonies were thereafter united into one colony, enabling the writer to follow the development of one constitutional system instead of four divergent ones. See n52 infra.
2. Roux in Worral (ed) South Africa : Government and Politics 31; Olivier in De Crespigny & Schire (eds) The Government and Politics of South Africa 19; Van Der Vyver 'Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights' (1982) 99 SALJ 570-571; Kennedy & Schlosberg The Law and Custom of the South African Constitution 74-75; Dugard Human Rights and the South African Legal Order 25-26; VerLoren Van Themaat Staatsreg 3ed 70 & 219; and Basson Verteenwoordiging in die Staatsreg 241 & n1; & 281.
3. De Smith The New Commonwealth and its Constitutions 77-78.
4. Op cit 77; and Boulle South Africa and the Consociational Option - a constitutional analysis 24 n2.
5. Boulle op cit 24; Wade & Phillips Constitutional and Administrative Law 19-20.
6. De Smith The New Commonwealth op cit 77; and Wade & Phillips op cit 136-140 in relation to the House of Lords.
7. De Smith The New Commonwealth op cit 77.
8. Op cit 77-82.
9. Op cit 77-78; and Boulle op cit 24-28.
10. Wade & Phillips op cit 19.
11. Op cit 16-20; and Dicey An Introduction to the Study of the Law of the Constitution 470 n2.
12. Wade & Phillips op cit 29-30.
13. Ibid.
14. Ibid. The gradual end of personal rule by the Sovereign is discussed by Wade & Phillips. Op cit 55-58. They have remarked that the years 1714 and 1832 were crucial to the decline of royal power.
15. Op cit 29-30 & 58.
16. Op cit 29. The Privy Council may be cited as one such relic from the period of royal, personal rule. Op cit 229-231. Jennings The Law and the Constitution 116 has said: 'The principles of constitutional law established by the courts recognize the constitution of the Revolution settlement. Institutions and practices which have grown up since that time have not received formal recognition by the courts, and the rules relating to them are not part of the Common Law.'
17. Wade & Phillips op cit 17-18.
18. Op cit 18; and Markesinis The Theory and Practice of Dissolution of Parliament 56-61.

19. Wade & Phillips op cit 223. There may be circumstances however in which a Sovereign may be expected to exercise a discretion or 'reserve' power. Op cit 225-226.
20. Op cit 18.
21. Op cit 226.
22. Op cit 226-228. It has been argued that there can be no grounds to justify the refusal of a dissolution to a Prime Minister who commands a clear majority in the Commons. Op cit 226. Wade & Phillips believe, however, that a Sovereign can refuse a dissolution if this refusal is designed to prevent the Prime Minister from abusing his position. Op cit 226 n28; & 228.
23. In 1965 the Sovereign dismissed the Prime Minister and other Cabinet Ministers of Southern Rhodesia. In 1975, her representative in Australia dismissed the government of Prime Minister Whitlam. Op cit 229.
24. Ibid. The power of dismissal is discussed at Ch 3 op cit 37-39; & Ch 7 op cit 211-212 & n185 infra.
25. Wade & Phillips op cit 19.
26. The legal rules of the constitution are made up through a combination of both statutory rules and Common Law. Dicey op cit 23-24.
27. Op cit 19. Some of the non-legal rules of the British constitution are listed by Dicey. Op cit 26; & 420-422. See also Hood Phillips Constitutional and Administrative Law 113-119.
28. Wade & Phillips op cit 16.
29. Dicey op cit 24; & 428.
30. Wade & Phillips op cit 16.
31. Jennings Constitution op cit 81.
32. MacIntosh The British Cabinet 14.
33. Jennings Constitution op cit 82-83.
34. De Smith The New Commonwealth op cit 78. Keith Dominion Home Rule in Practice 7 explains the term 'Dominion' as follows:
    '"Dominion" as a technical term denoting a colony possessing responsible government owes its origin to a resolution of the Colonial Conference of 1907, which aimed at drawing a clear distinction between such colonies and those the administration of which was controlled by the government of the United Kingdom ..... The Dominions now comprise the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.'
    The term 'responsible government' is discussed at Ch 2 op cit 12 & n5 infra.
35. Keith The Constitutional Law of the British Dominions 99.
36. Ibid.
37. Op cit 99-100.
38. Op cit 99. While there is no doubt that transmuting convention into law would have posed many difficulties, it is questionable whether the United Kingdom government was in a hurry to foster Dominion autonomy. VerLoren Van Themaat has asserted for example, that in the late 1920's the British government was anxious to maintain intra-Commonwealth

relations on a somewhat ambiguous, conventional footing. In this way, the United Kingdom government hoped to maintain a 'reserve power' to intervene in the affairs of Dominions during times of crisis. VerLoren Van Themaat 3ed op cit 125-126.

39. De Smith The New Commonwealth op cit 80.
40. Op cit 83. How would it be possible for example, to frame a 'reserve' power which would enable the Sovereign to dissolve Parliament or dismiss Ministers without advice? Wade & Phillips op cit 226-229.
41. De Smith The New Commonwealth op cit 86-90. De Smith discusses the decision of the Privy Council in Adegbenro V Akintola [1963] 3 WLR 63.
42. Keith Law of the British Dominions op cit 99-100.
43. De Smith The New Commonwealth op cit 78-79.
44. Ibid.
45. Op cit 79.
46. Ibid. As far as South Africa under the Union Constitution was concerned, see Hahlo & Kahn The Union of South Africa - The Development of its Laws and Constitution 129-131; & 133.
47. De Smith The New Commonwealth op cit 78; and Reference re Amendment of the Constitution of Canada (1982) 125 DLR (3d)1 at 82-83
48. De Smith has acknowledged that the term 'Prime Minister' appears in the Schedule to the South Africa Act of 1909. De Smith The New Commonwealth op cit 78 n2.
49. A definition of the term 'Constitutional Law' will be sought in Ch 4 op cit 107-111 infra.
50. A complete study of the workings in South Africa of constitutional convention would be a huge task. An in-depth analysis of South African political history since 1910 would be necessary - a task which is well beyond the parameters established for this current work.
51. In terms of 'political reality' under a Westminster constitution, convention will prevail over the forms of government which survive in 'archaic' law. Where the competition between the two types of rule is brought before the courts however, it is the legal rule which can be expected to prevail. This is discussed at greater length elsewhere. Ch 6 op cit 137-138; & 161-169 infra.
52. The constitution which was established under the provisions of the Republic of South Africa Constitution Act No 110 of 1983 is fully described by Dean. Dean 'A New Constitution for South Africa?' (1984) Jahrbuch Des Öffentlichen Rechts Der Gegenwart 460-546.
53. Booysen & van Wyk Die '83 Grondwet 42.
54. As has been assumed in the past by VerLoren Van Themaat prior to the introduction of a new constitution in 1984. VerLoren Van Themaat 3ed op cit 68; 179; & 179-186. Reference to these sources will indicate that VerLoren Van Themaat treated South African conventions as an outgrowth of British ones, rather than as distinct phenomena in their own right. See also Goldblatt (1978) 5 LAWSA 4 & nn4-5.
55. Booysen & Van Wyk op cit 42 & nn14 & 15. The two writers observe:

'Dit is by voorbeeld 'n goeie vraag of 'n Suid-Afrikaanse minister onder soortgelyke omstandighede as mnr Cecil Parkinson in Brittanje so lank geduld sou word; aan die ander kant is dit 'n vraag of 'n Britse minister onder soortgelyke omstandighede as mnr S P Botha in Suid-Afrika so lank toegelaat sou gewees het om sy portefeulje te behou.'

56. N54 supra.
57. Boulle op cit 152-199; and Van Der Vyver (1982) SALJ op cit 570-582. The importance of the State Security Council in the decision-making process, and the increasing political influence of government-appointed technocrats are described in Rotberg 'The Process of Decision-making in Contemporary South Africa' (1983) No 22 Africa Notes 3-6; & 8. The importance of the State Security Council has continued under the new Constitution. Dean 'Control by Cabal' (1986) 5 (No 4) Leadership 58-62; and Basson & Viljoen Suid-Afrikaanse Staatsreg 59-60 and 63.
58. Boulle op cit 157; and Dean Constitution op cit 474-475.
59. Boulle op cit 182-199. The policy of Separate Development, and the decline of the 'Rule of Law' are among the features listed.
60. H Giliomee The Parting of the Ways : South African Politics 1976-1982 99-100. The ethnic character of parliamentary politics will be discussed further. Ch 7 op cit 203-204 infra.
61. Vorster in Jacobs (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika 180 and 182; and Boulle op cit 148. One-party dominance of Parliament has important implications for the workings of constitutional convention. Ch 6 op cit 148-153; and Ch 7 op cit 203-225 infra. The absence of the classic two party system in the legislative is even more apparent under the new constitutional system introduced in 1984.
62. Boulle op cit 158-199. A detailed history of political rights in the Coloured community is to be found in the Erika Theron Report. Report of the Commission of Inquiry into matters relating to the Coloured Population Group RP 38/1976 Chs 16 & 17.
63. Boulle op cit 146-147.
64. N52 supra.

CHAPTER II

FOOTNOTE AUTHORITIES

1. Hahlo & Kahn The Union of South Africa - the development of its Laws and Constitution 55-57.
2. Op cit 66-69.
3. Op cit 112-114. Prior to the occupation of the South African Republic (Transvaal) and the Orange Free State by British troops in 1900, the constitutional development of the two Boer republics was in sharp contrast to that of Natal and the Cape Colony. Hahlo & Kahn op cit 72-83; & 84-110 for a description of constitutional developments in the S.A.R. and the O.F.S. respectively.
4. Op cit 130.
5. Keith The Dominions as Sovereign States 162 where he says: 'Applied to Dominion conditions, responsible government demands that the powers of the Crown or its representative... must be exercised on the advice of ministers. Ministers must be members of the legislature, and possess the confidence of the majority thereof ... A ministry depends on the leadership of the Prime Minister, who is selected by the Crown as commanding the support of the majority of the lower house and who recommends his colleagues for office. On defeat in that house on any important issue a ministry must resign unless it is granted a dissolution. A ministry must observe solidarity of action and of responsibility to the lower house.'
   It is clear from the context that Keith's definition is not exclusive to the 'Dominions'. Although at 163 he refers to the position under the Union constitution of 1909, the status of the South African colonies prior to that date was not materially different. VerLoren Van Themaat Staatsreg 3ed op cit 201-202.
6. Keith The Dominions op cit 61-62; and Jennings The Law and the Constitution 93.
7. In the Cape, the grant of responsible government meant that members of the legislature could become Ministers of the Crown while retaining their parliamentary seats. The Governor was under no obligation to appoint members who had the support of a majority in the legislature, but he did exercise his powers in accordance with the principles of the Durham Report on Canada. VerLoren Van Themaat 3ed op cit 194 & n51.
   The legal position was much the same in the Transvaal and the Orange River Colony. Hahlo & Kahn op cit 112.
   In Natal, the legal basis of responsible government was slightly different. Ministers were obliged to be or become members of the legislature within four months of their appointment, and they could be removed by the Governor on 'political grounds'. Hahlo & Kahn op cit 69. For details of the principles of Lord Durham's Report, refer to Keith The Constitution, Administration and Laws of the Empire 205-207; and VerLoren Van Themaat 3ed op cit 113.
8. May The South African Constitution 1-2.

9. Ibid.
10. Op cit 1.
11. Ibid. In the Cape Colony in 1878, the Governor (Sir Bartle Frere) dismissed the Molteno ministry in a manner which ran contrary to the spirit of 'responsible government'. Hahlo & Kahn op cit 56-57; and VerLoren Van Themaat 3ed op cit 194 n53. The attitude of the United Kingdom government at that time was summed up by the Colonial Secretary as follows:
'... it should be borne in mind that, in consequence of the peculiar conditions of the colony and the adjacent territories, responsible government, as established at the Cape, has necessarily been made subject to a limitation not elsewhere required.'
VerLoren Van Themaat 3ed op cit 194 n53.
In 1910 however, a subtle change took place. Reference to the Royal Instructions directed at the Governor-General of the Union indicated that he was to be closely tied to the advice of his Executive Council. The superceded Royal Instructions directed at the Governors of the former South African Colonies had given the latter a much greater leeway to act without local Ministerial advice. Schierhout v Union Government 1927 AD 94 at 108-109 per Gardiner A J A.
Hence, VerLoren Van Themaat may be right to conclude:
''n Verhoogde status het uniewording oor die algemeen nie meegebring nie. Die kolonies het reeds almal selfbestuur in die vorm van parlementêre self regering besit ... Wel sou die britse owerhede moontlik minder gou met die Unie se sake ingemeng het en die Unie se mening meer gesag gedra het, as in die geval van die kleiner kolonies'
VerLoren Van Themaat 3ed op cit 201.
12. De Smith The New Commonwealth and its Constitutions 78-79.
13. South Africa Act 1909 9 Edw VII C 9 s 14. This provision brought the Union Constitution into line with the third fundamental principle of Westminster government. Ch 1 op cit 2 supra.
14. The Governor-General-in-Council exercised powers which dealt with matters such as the establishment of departments of State, the organisation of the judiciary, and the anticipated South African administration of the High Commission territories. South Africa Act 1909 ss 14;96;97;100;101;102; 107;108;114;126 and the Schedule paragraphs 1-3; 9-11; 13; 19;21; & 24.
It controlled the appointment and removal of all officers of the public service of the Union. Op cit s 15. It dealt with matters relating to Provincial government. Op cit ss 68;75; 76;78(2);82;84;85; & 89-92. It also dealt with matters relating to the Electoral Commission. Op cit ss 38;41; & 42. Refer also to Kennedy & Schlosberg The Law and Custom of the South African Constitution 140. The most important power vested in the Governor-General-in-Council was the control and administration of 'native affairs and of matters specially or differentially affecting Asiatics'. South Africa Act 1909 s 147.
15. South Africa Act 1909 s 14:
'The Governor-General may appoint officers not exceeding ten

in number to administer such departments of State of the Union as the Governor-General-in-Council may establish; such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's Ministers of State for the Union.'

16. Roux in Worrall (ed) South Africa : Government and Politics 69:
"... the South African executive council prior to 1961 also included ex-ministers. This body never met as such. Its duties and powers were performed by the serving ministers who were collectively known as the cabinet.'
Kahn The New Constitution 22 & n18; and May op cit 184-185. The prevailing political practice of following Ministerial advice was recognized by the Courts quite clearly in the case of Union Government v Schierhout 1925 AD 322 per Innes CJ 336:
'The right to remove officers from the public service is a power expressly vested in the Governor-General-in-Council by section 15 of the South Africa Act ... He acts on the advice of his Ministers; the ultimate responsibility is not his but theirs ...'
See also Schierhout v Union Government 1927 AD 94 per Gardiner A J A 108-109.
17. South Africa Act 1909 s 147.
18. In 1911, the Black proportion of the total population of the Union was 67,3%. The equivalent Asiatic proportion of the population was 2,6%. These figures remained stable throughout the life of the Union Constitution. In 1960, Blacks formed 68,3% of the total population of the Union, and Asiatics formed 3% of the total population.
Report of the Commission of Inquiry into Matters Relating To The Coloured Population Group R.P. 38/1976. Ch I, table 1.2.
19. Ch 1 op cit 2 supra.
20. Certain important powers were vested in the Governor-General of the Union, rather than in the Governor-General-in-Council. In relation to these excepted powers, the Governor-General was under no legal obligation to follow advice. This matter will shortly be examined in greater detail. Ch 2 op cit 16-17 infra.
21. S 13 of the 1909 Act was further reinforced by the Interpretation of Laws Act No 5 of 1910. S 3 thereof, in conjunction with s 2, defined the expression 'Governor-General' for the purposes of existing legislation (including the South Africa Act) and any future legislation as follows:
'"Governor-General" shall mean the officer for the time being administering the government of the Union acting by and with the advice of the Executive Council thereof; ...'
22. Ch 1 op cit 2 supra.
23. Ministerial accountability to Parliament has long been safeguarded by other legal requirements however. Refer to ss 117 & 120 infra.
24. Revenues could be raised by the government of the Union in two different ways. Firstly, taxes imposed by statute could

be enacted by the Union Parliament in accordance with the principles established by Lord Mansfield in the case of Campbell v Hall 1774 1 Cowper 204; 98 ER 1045 at 1048-1049 & 1050.
Secondly, additional revenue could be obtained by way of loans to the Governor-General in terms of statutes such as the General Loans Act No 17 of 1911; or the General Loans Consolidation and Amendment Act No 22 of 1917.

25. S 117 also established a separate Railway and Harbour Fund into which were paid the revenues deriving from the administration of ports, harbours and railways. S 117 read with s 120 ensured that revenue could be appropriated from the Fund only in terms of an Act of Parliament.
26. Kennedy & Schlosberg op cit 156 & 158; or Dean 'A New Constitution for South Africa?'(1984) Jahrbuch Des Öffentlichen Rechts Der Gegenwart Ch D, paragraph 5(a). The annual nature of the Appropriation Acts can be seen clearly, for example, in the Appropriation (1912-1913) Act No 21 of 1912. The annual character of these Acts was further re-inforced by the Exchequer and Audit Act No 21 of 1911 s 34, which said: 'No Appropriation Act shall be construed as authorizing moneys appropriated thereby to be expended in any financial year other than the financial year to which it is expressed to relate...'
27. The Union Constitution was later extensively altered by the Status of the Union Act No 69 of 1934, and the Royal Executive Functions and Seals Act No 70 of 1934. Ch 3 op cit 91-100 infra.
28. N14 supra.
29. Ch 2 op 14 and nn15 & 16 supra.
30. South Africa Act 1909 s 12 as follows:
'There shall be an Executive Council to advise the Governor-General in the government of the Union, and the members of the council shall be chosen and summoned by the Governor-General and sworn as executive councillors, and shall hold office during his pleasure.'
31. Op cit s 14. S 14 is set out in n15 supra.
32. South Africa Act 1909 s 64 as follows:
'When a Bill is presented to the Governor-General for the King's assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King, that he assents in the King's name, or that he witholds assent....'
Reservation of Bills, and the related issue of Disallowance, will be dealt with separately. Ch 2 op cit 17-19 infra.
33. South Africa Act 1909 s 20 as follows:
'The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone,...'
and op cit s 45 as follows:
'Every House of Assembly shall continue for five years from

the first meeting thereof, and no longer, but may be sooner dissolved by the Governor-General.'
See also the Governor-General's Letters Patent, paragraph 111.

34. In addition to the South Africa Act 1909 ss 12;14;64;20;& 45 (as set out in nn30;15;32;& 33 respectively), refer also to s 8 (as set out in Ch 2 op cit 24 infra). The constitutional position of the King, and the exercise of the royal prerogative will be referred to at a later stage. Ch 2 op cit 24-29 infra.
35. It is also different from the formula contained in the Interpretation of Laws Act No 5 of 1910 s 3, which uses the words: 'acting by and with the advice of the Executive Council.' N21 supra.
36. N16 supra.
37. An analogy can be drawn with the decision in R V Mbete 1954 (4) SA 491 (E) per Reynolds J at 492-493, where the obligation upon the Minister to consult with the 'Natives' (and thereby give the latter an opportunity 'to tender advice') did not oblige him to follow that advice. See also the decision in R V Ntlemeza 1955 (1) SA 212 (A) per Van Den Heever J A at 217-218; & 219.
38. This inference is supported by the established general principle 'generalia specialibus non derogant', which applies to the interpretation of statutes. Steyn Die Uitleg Van Wette by Tonder (ed) 193-195; and R V Gwantshu 1931 EDL 29 per Gutsche J at 31.
It is clear from the wording of s 2 of the Interpretation of Laws Act No 5 of 1910, that the definition of the term 'Governor-General' in s 3 of that Act, was not intended to apply to the South Africa Act of 1909. S 2 of the Interpretation Act of 1910 said:
'In the interpretation of every law ... now or hereafter in force in the Union ... the definitions ... in this Act contained shall, unless there be something in the language or context of the law ... repugnant to such definitions ... or unless the contrary intention therein appear, be adopted and applied.'
39. The Royal Instructions of 1910, paragraph VII used to read:
'The Governor-General shall not assent in Our name to any bill which We have specially instructed him through one of Our Principal Secretaries of State to reserve; and he shall take special care that he does not assent to any bill which he may be required under the South Africa Act, 1909, to reserve...'
40. VerLoren Van Themaat 3ed op cit 122 & n67; & 203. At 122 & n67 he says:
'Indien 'n wetsontwerp, hetsy ingevolge instruksies, hetsy in ooreenstemming met wetgewing, hetsy in die uitoefening van sy diskressie deur die goewerneur-general vir die koning se welbehae voorbehou is, het die koning die advies van sy britse ministers in sy beslissing gevolg.'
Coertze 'Die Wetgewende Orgaan Van Die Unie Van Suid-Afrika' (1941) 5 THR-HR 34 at 52-53 & n2.
The King's assent to a reserved Bill used to be given in the

form of an Order-in-Council. Keith The Dominions op cit 200-201. In granting or witholding his assent, it would have been difficult for the King to ignore the advice of his Ministers in the United Kingdom. This can be asserted because all members of the British Cabinet become members of the Privy Council, and take responsibility for the content of its Orders-in-Council. Wade & Phillips Constitutional and Administrative Law 230-231. Furthermore, the official seals used on such documents were in the hands of Ministers of the United Kingdom government. VerLoren Van Themaat 3ed op cit 204.

41. South Africa Act 1909 s 66 as follows:
'A Bill reserved for the King's pleasure shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General for the King's assent, the Governor-General makes known by speech or message to each of the Houses of Parliament or by proclamation that it has received the King's assent.'

42. Op cit s 64; especially the words: '...he shall declare according to his discretion ... that he reserves the Bill...;' See Ch 2 op cit 18 & n40 supra.
In South Africa, it is difficult to envisage a situation in which the Governor-General would have behaved in this fashion. Discretionary reservation was not exercised in 1914 under circumstances in which the Governor-General may have been tempted to use it. Evatt The King and His Dominion Governors 175-176 & n4. It is probable that he would only have used this discretionary power if instructed to do so in a particular instance by the Imperial authorities in London. VerLoren Van Themaat 3ed op cit 203 & n77.
cf Keith The Dominions op cit 228.

43. South Africa Act 1909 s 64 (as set out in Ch 2 op cit 17-18 supra); VerLoren Van Themaat 3ed op cit 122 & n66; 203 & n77; and the Royal Instructions of 1910 paragraph VII as follows:
'The Governor-General shall not assent in Our name to any bill which We have specially instructed him through one of Our Principal Secretaries of State to reserve ... and in particular he shall reserve any bill which disqualifies any person in the Province of the Cape of Good Hope, who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is, or may become, capable of being registered as a voter, from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only.'
This method of reservation was never exercised. Hahlo & Kahn op cit 149.

44. South Africa Act 1909 s 64 as follows:
'...All Bills repealing or amending this section or any of the provisions of Chapter IV under the heading 'House of Assembly', and all Bills abolishing provincial councils or abridging the powers conferred on provincial councils under section eighty-five, otherwise than in accordance with the provisions of that section, shall be so reserved...'
and op cit s 106 as follows:
'There shall be no appeal from the Supreme Court of South

Africa or from any division thereof to the King-in-Council, but nothing herein contained shall be construed to impair any right which the King-in-Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King-in-Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure...'
See also the South Africa Act 1909 Schedule, paragraph 25 as follows:
'All Bills to amend or alter the provisions of this Schedule shall be reserved for the signification of His Majesty's pleasure.'
The Schedule laid down the terms under which the South African government would administer the neighbouring British Protectorates, if and when these territories were transferred to the administration of the Union. Wheare The Constitutional Structure of the Commonwealth 42.

45. Keith The Dominions op cit 67. Examples of such Imperial legislation included the Merchant Shipping Act 1894 57 & 58 Vict C 60 and the Colonial Courts of Admiralty Act 1890 53 & 54 Vict C 27.
46. For the attitude of the British Colonial Secretary towards the Unions' Indemnity Bill of 1914, refer to Evatt op cit 175-176.
47. VerLoren Van Themaat 3ed op cit 122 & n68; 203; and Coertze (1941) 5 THR-HR op cit 52-53 & n2.
Disallowance of legislation was effected by the Privy Council in the form of Orders-in-Council. Keith The Dominions op cit 200-201. Hence, if British Ministers advised the King to exercise disallowance in spite of opposition from the relevant Dominion ministry, the King would be obliged to follow British Ministerial advice. For the reasons, refer to n40 supra in relation to the reservation of Dominion Bills.
48. No Canadian Act had been disallowed since 1873, no New Zealand Act since 1867, and no Act of the Commonwealth of Australia or of the Union of South Africa was ever disallowed. Keith The Dominions op cit 69; and VerLoren Van Themaat 3ed op cit 203.
49. VerLoren Van Themaat 3ed op cit 122 n68 says:
'Die gebruik was al geriume tyd voor 1926 dat die britse ministers nie die koning adviseer om wette teen die advies van die ministers van die vrygeweste nietig te verklaar nie. Formeel het die britse minister die koning nog jaarliks geadviseer om nie sy bevoegdheid om vrygewestelike wette binne 'n jaar of twee nietig te verklaar uit te oefen nie. Die staat-sekretaris vir vrygewestelike sake in Londen het nog jaarliks alle wette van die vrygeweste aan die koning gestuur het met die medeling dat die koning nie geadviseer sal word om sy bevoegdheid van nietigverklaring uit te oefen nie.'
50. In other words the government of the United Kingdom. The Kingdom of England was declared an Empire by Parliament in the reign of Henry VIII. The United Kingdom succeeded to

this imperial rank. Keith The Dominions op cit 3-4. For the 'Imperial Parliament' refer to Ch 2 op cit 20-21 infra.

51. Those provisions are the South Africa Act 1909 ss 8;12;64; & 65; and Royal Instructions of 1910 paragraph VII.
52. Wheare The Commonwealth op cit 21; and especially Kennedy & Schlosberg op cit 93-95.
53. Blackstone refers to the doctrine in his Institutes as early as 1765. See Kennedy & Schlosberg op cit 93-94 & 99. For the applicability of English common law in South Africa, see n 94 infra.
54. The Colonial Laws Validity Act 1865 28 & 29 Vict C 63. Wheare The Commonwealth op cit 22. The term 'Colony' for the purposes of the Act is defined in s 1 as follows:
'The term "Colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature...'
This definition was sufficiently wide to make the Act applicable to South Africa.
55. Wheare The Commonwealth op cit 21.
56. VerLoren Van Themaat 3ed op cit 121 & 202; Keith The Dominions op cit 73-74; or Kennedy & Schlosberg op cit 99. It should be noted that ss 35;137; & 152 of the South Africa Act 1909 were 'entrenched'. Furthermore, ss 33;34; & 85 could not be altered for a certain period of time after Union. Any attempt by the Union Parliament to ignore the relevant entrenched procedures or to amend provisions which were temporarily unalterable, would have been contrary to the South Africa Act. It would have been an attempt by the Union Parliament to legislate in direct conflict with an Imperial Statute applying in South Africa. Hence, the entrenched and the unalterable terms of the South Africa Act were protected by the provisions of the Colonial Laws Validity Act 1865. VerLoren Van Themaat 3ed op cit 202.
57. Keith The Dominions op cit 73-74.
58. Op cit 63.
59. VerLoren Van Themaat 3ed op cit 204.
60. South Africa Act 1909 ss 8 & 9. See Ch 2 op cit 24-25 infra; and VerLoren Van Themaat 3ed op cit 204.
The King's failure to delegate the prerogative powers to the Governor-General caused difficulties for the Union Ministry. Ch 2 op cit 25-29 infra.
61. Evatt op cit 175-176. In many respects therefore, the Governor-General was expected to act on the advice of his Ministers of State for the Union. This matter will be examined further in relation to constitutional conventions. Ch 3 op cit 32-45 infra.
62. Kennedy & Schlosberg op cit 117-119; and VerLoren Van Themaat 3ed op cit 204.
63. N60 supra.
64. Ch 1 op cit 2-5 supra.
65. Ibid.
66. VerLoren Van Themaat 3ed op cit 203-204 describes the extensive obligations of the Governor-General to the Imperial Government. See also Kennedy & Schlosberg op cit 137.
67. Ch 2 op cit 17-19 & nn39-46 supra.

68. Kennedy & Schlosberg op cit 124; VerLoren Van Themaat 3ed op cit 203 & n77.
69. Letters Patent were used to constitute the office of Governor-General. Their contents were concerned with the nature of such office, and the powers appertaining to the office. These Letters Patent could be revoked, altered or amended at any time. Kennedy & Schlosberg op cit 123-124. See also the Letters Patent of 29th December 1909, paragraph VIII.
The 'formal instructions' is a reference to the Royal Instructions. These Instructions were concerned with the duties of the Governor-General, and the manner in which they were to be performed. Kennedy & Schlosberg op cit 125. New Royal Instructions could be issued at any time. See Letters Patent of 29th December 1909 paragraph 1 as follows: 'And We do hereby authorise and command Our said Governor-General ...to do and execute ... all things that shall belong to his said office ... according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet...'
The Sign Manual is a reference to the signature of the Sovereign. The Signet is the Royal Signet, which used to be used in Royal Instructions to confirm the Sovereign's signature. May op cit 175.
70. N68 supra.
71. Ch 2 op cit 18 & n43 supra. An Instruction to reserve legislation would cause less difficulties than an Instruction to the Governor-General to veto legislation outright. Ch 3 op cit 40-42 infra.
72. VerLoren Van Themaat 3ed op cit 203 & n77; & Ch 2 op cit 16-17 nn27-38 supra.
73. Ch 2 op cit 16-17 supra.
74. VerLoren Van Themaat 3ed op cit 203; Kennedy & Schlosberg op cit 97-98.
75. Ibid. See also MacLeod v Attorney-General of New South Wales [1891] AC 455 Halsbury L C at 457 & 458.
76. VerLoren Van Themaat 3ed op cit 203-204.
77. South Africa Act 1909 s 59.
'Parliament shall have full power to make laws for the peace, order, and good government of the Union.'
78. VerLoren Van Themaat 3ed op cit 204; or Kennedy & Schlosberg op cit 98.
79. Ch 2 op cit 21 & n60 supra.
80. Ibid. The words of s 8 specifically refer to the Governor-General as the King's 'representative'.
81. Ch 2 op cit 14 nn14 & 16 supra. See also VerLoren Van Themaat Staatsreg 2ed 260.
82. Ch 2 op cit 16 & nn30-34 supra. See also VerLoren Van Themaat 2ed op cit 261 & n44 in relation to the Supreme Command of the Armed Forces in South Africa.
The Supreme Command was bestowed upon the Governor-General by s 17 of the South Africa Act, 1909, as follows:
'The command-in-chief of the naval and military forces within the Union is vested in the King or in the Governor-General as his representative.'

See also the Letters Patent of 1909, paragraph I as follows:
'There shall be a Governor-General and Commander-in-Chief in and over the Union ... And We do hereby authorise and command Our said Governor-General and Commander-in-Chief ... to do and execute, in due manner, all things that shall belong to his said office ... according to the several powers and authorities granted or appointed him by virtue of the South Africa Act 1909, and of these present Letters Patent...'

83. Royal Instructions 1909 paragraph IX.
84. Ibid. This is summarized in Kennedy & Schlosberg op cit 125-127. See also VerLoren Van Themaat 2ed op cit 261 & n45.
85. Coertze 'Die Posisie Van Die Koning As Hoof Van Die Uitvoerende Gesag Van Die Unie Van Suid-Afrika' (1939) 3 THR-HR 249.
86. Op cit 249-250. The Prerogative is discussed at n94 infra.
87. Kennedy & Schlosberg op cit 128; or VerLoren Van Themaat 2ed op cit 260. Kennedy & Schlosberg appear to be uncertain about why the Governor-General could appoint K.C.'s. They say at op cit 128:
'The appointment of King's counsel is an executive act. The appointment must not be regarded as one conferring an honour from the crown. It is an executive act concerning the internal government of the country, necessary for certain executive purposes, but what they are it is impossible to say.'
88. VerLoren Van Themaat 2ed op cit 261 says:
'As hoof van die uitvoerende gesag kon die goewerneur-generaal namens die koning ondergeskikte wetgewing afkondig.'
89. Coertze (1939) 3 THR-HR op cit 250; VerLoren Van Themaat 2ed op cit 259 n35.
90. (i) The appointment of the Governor-General was regulated by the South Africa Act 1909 ss 4 & 9. S 4 established:
'... the King may at any time after the proclamation appoint a Governor-General for the Union.'
S 9 stated:
'The Governor-General shall be appointed by the King...'
(ii) The appointment of the 'Officer Administering the Government' was regulated by s 11 of the Act, which laid down:
'The provisions of this Act relating to the Governor-General extend and apply to the Governor-General for the time being or such person as the King may appoint to administer the government of the Union...'
(iii) Leave to appeal to the Privy Council was regulated by s 106 of the Act. See n44 supra.
91. Coertze (1939) 3 THR-HR op cit 250 & nn2-4; and VerLoren Van Themaat 2ed op cit 259 n35.
92. Coertze (1939) 3 THR-HR op cit 250 & n1; and VerLoren Van Themaat 2ed op cit 259 n35.
93. Paragraph I of the Letters Patent of 1909 said:
'And We do hereby authorise and command Our said Governor-General... to do and execute ... all things that shall belong to his said office ... according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us

through one of Our Principal Secretaries of State...'
See further, Ch 2 op cit 22-23 & n69 supra, in relation to Instructions of the Secretary of State for the Colonies and Instructions of the King respectively. See further Wade & Phillips op cit 311-312 in relation to Orders-in-Council which give effect to the decisions of the Privy Council.

94. English constitutional law is the major legal source of South African constitutional law. See VerLoren Van Themaat 3ed op cit 52-69; Basson Verteenwoordiging in die Staatsreg 241 & n1; 281; and Kennedy & Schlosberg op cit 74-75.
The relationship between English and Roman-Dutch law is summed up by VerLoren Van Themaat 3ed op cit 68.
See further: Ch 7 op cit 185 infra; Hahlo & Kahn op cit 170-172; Goldblatt (1978) 5 LAWSA 22 & n4; Union Government v Estate Whittaker 1916 AD 194 per Innes C J at 202-203; and Sachs v Dönges 1950 (2) SA 265 (A) per Watermeyer C J at 275-276, and Schreiner J A at 306-307.
For the executive or prerogative powers of the Crown in the United Kingdom, see Dicey An Introduction to the Study of the Law of the Constitution op cit 422-426; Attorney-General v De Keysers Royal Hotel Ltd [1920] AC 508 per Lord Dunedin at 526; and Wade & Phillips op cit 231-241.

95. Coertze (1939) 3 THR-HR op cit 250; VerLoren Van Themaat 2ed op cit 259 n35. Coertze (1939) 3 THR-HR op cit 250 n5 acknowledges that the list of prerogative powers which he refers to is not exhaustive.

96. VerLoren Van Themaat 2ed op cit 260.

97. VerLoren Van Themaat 2ed op cit 260 says in relation to 'Acts of State':
'Die uitoefening van prerogatiewe soos anneksasie, sessie van grondgebied, erkenning van vreemde state en van vreemde grondgebied, word dikwels met die benaming „Acts of State" bestempel'

98. A royal warrant would include the Commission appointing a new Governor-General, Letters Patent and Royal Instructions. See VerLoren Van Themaat 2ed 260. It has already been noted that the appointment of a Governor-General, and the issue of Royal Instructions, were not delegated by the King. Ch 2 op cit 26-27 & nn90-92 supra.

99. VerLoren Van Themaat 2ed op cit 259 n35; or Coertze (1939) 3 THR-HR cit 250, who says:
'Met die totstandkoming van die Unie was al hierdie bevoegdhede van die Koning soveel bevoegdhede van die Unie, want die Unie was 'n aparte owerheidspersoon, sy dit 'n afhanklike persoon. Hierdie bevoegdhede van die Unie moes deur die Koning, as orgaan van die nuwe persoon, uitgeoefen word, want hulle was vir hom voorbehou.'

100. Coertze (1939) 3 THR-HR op cit 252; or VerLoren Van Themaat 2ed op cit 258-259. The latter's comments about the King's signature would apply equally to the pre-1937 period of South African constitutional history.

101. Coertze (1939) 3 THR-HR op cit 252; VerLoren Van Themaat 2ed op cit 239.

102. Coertze (1939) 3 THR-HR op cit 252.

103. Ibid.

104.VerLoren Van Themaat 2ed op cit 239.
105.Ibid.
106.For reservation of Bills in the Union, see Ch 2 op cit 17-19 supra. For disallowance of Acts, see op cit 19 supra.
107.VerLoren Van Themaat 2ed op cit 202-203; & 238-239.
108.Ibid. For reservation, see also Ch 2 op cit 18 & n40 supra. For disallowance, see also Ch 2 op cit 19 & n47 supra.
109.N94 supra.
110.It goes without saying of course, that the South Africa Act of 1909 was itself an Act of the Imperial Parliament.

CHAPTER III

FOOTNOTE AUTHORITIES

1. Ch 2 op cit 19-29 supra.
2. Ch 1 op cit 10-11 & nn56-62 supra.
3. Kennedy & Schlosberg The Law and Custom of the South African Constitution 136-146, especially 142.
4. Reference to the 'house' means the House of Assembly. Op cit 141-142.
5. Ch 1 op cit n53 supra.
6. Kennedy & Schlosberg op cit 139-141.
7. Op cit 139-140; and VerLoren Van Themaat Staatsreg 2ed 264.
8. Kennedy & Schlosberg op cit 139. The writers observed that membership of the Executive Council included all existing and all previous Ministers of State for the Union. The number of currently serving Ministers of State who could sit on the Executive Council was restricted to ten. Ch 2 op cit n15 supra. Noting that members of the Executive Council were never dismissed and that they never retired [Kennedy & Schlosberg op cit 139] it would not have taken long before the ten existing Ministers of State were outnumbered on the Council.
9. Kennedy & Schlosberg op cit 139 where the writers remark: '... the practice of constitutional government does not require the attendance of the whole executive council to advise the governor-general ... It would mean that if the whole executive council were summoned to advise the governor-general, the existing cabinet and the past cabinets, which must necessarily include the opposition leaders in parliament, would be sitting at the same table advising the governor-general when to dissolve parliament and when not to dissolve parliament ... and to do a great number of acts which were, and which might become, matters of contention and conflict between the ministers and the opposition on the floor of the house of assembly.' Opposition leaders were necessarily members of the Executive Council, because there was a change of government after the general elections of 1924. Op cit 144.
10. Ch 1 op cit 2-5 supra.
11. Ch 1 op cit 5-6; 10; and Ch 2 op cit 12 supra.
12. Ch 2 op cit 12-19 supra.
13. Kennedy & Schlosberg op cit 139-140; and VerLoren Van Themaat 2ed op cit 264.
14. Kennedy & Schlosberg op cit 139; VerLoren Van Themaat 2ed op cit 264 & n57; and Keith The Dominions as Sovereign States 241.
15. Executive authority was vested in the King, and in the Governor-General as his representative. Ch 2 op cit 24 supra. The pivotal role of the Cabinet is described in this chapter. Op cit 32-33 & 38-39 infra.
16. Ch 2 op cit 13 supra.
17. S 14 of the South Africa Act 1909 is set out in Ch 2 op cit n15 supra.
18. Ch 2 op cit 16-17 & nn31; 37 & 38 supra.

19. The South Africa Act 1909 makes no reference to the 'Cabinet'. None of its provisions oblige the Governor-General to act 'with and by the advice of' his Ministers of State for the Union.
20. Keith The Dominions op cit 248. He uses the word 'Ministry' instead of the 'Cabinet'.
21. Kennedy & Schlosberg op cit 141. This convention is further discussed. Ch 3 op cit 46-48 infra.
22. Kennedy & Schlosberg op cit 142.
23. Ibid; and Keith The Dominions op cit 244-245. At 245 Keith remarks:
'It is seldom that more than one leader of the majority party could succeed in forming a Government. The Governor, however, can offer the chance to whomever he thinks fit, and, if he can secure colleagues, can formally appoint him.'
24. Kennedy & Schlosberg op cit 141; and Keith The Dominions op cit 244.
25. In this way, convention gave force to one of the fundamental precepts of a Westminster Constitution ie government must be carried on in accordance with the will of the directly elected House, and ultimately with the will of the electorate as expressed through that House. See Dicey Law of the Constitution 428; 431; and Jennings Cabinet Government 13-19, in relation to the United Kingdom constitution. See Kennedy & Schlosberg op cit 141 in relation to the constitution of the Union. See further, Ch 5 op cit 119; and Ch 6 op cit 138 & 144 infra.
26. Kennedy & Schlosberg op cit 141.
27. Ibid; and Keith The Dominions op cit 246 in relation to the Dominions generally. The appointment of new Ministers of State meant that the previous Ministers of State had been relieved of office. N49 infra.
28. N17 supra.
29. Keith The Dominions op cit 244. In relation to the first three Prime Ministers of the Union, Keith observed:
'Generals Botha, Smuts and Hertzog have been masters in their own home'. Op cit 247. See also Kennedy & Schlosberg op cit 143 & 145-146.
30. Keith The Dominions op cit 244.
31. South Africa Act 1909, Schedule, paragraphs 2; 4; and 6-11.
32. As regards the Dominions generally, see Keith The Dominions op cit 240-241.
33. In the United Kingdom, constitutional convention did not require the immediate resignation of a Prime Minister in circumstances where no party could muster a majority in the House of Commons. The Prime Minster and his colleagues could remain in office, and attempt to construct a new majority with support from other parties. Precedents for this course of action were clearly established in 1885 and again in 1892. Jennings Cabinet Government op cit 30-31; 490-492; and Wade & Phillips Constitutional and Administrative Law 18 & 224. This constitutional convention was first adopted in the Union by General Botha in 1915, and was clearly re-enforced by General Smuts in 1920. Kennedy & Schlosberg op cit 143-144; and Worrall South Africa:

Government and Politics by Worrall (ed) 192-194.

34. Kennedy & Schlosberg op cit 143-144.

35. At first, General Botha wanted to resign, because he did not want to rely on the Unionist Party for support. He had no choice but to stay, however, because no other party was strong enough to form a government. Krüger The Making of a Nation 103.
The results of the 1915 elections were as follows: South African Party 54 seats; Unionists 40 seats; National Party 27 seats; Labour 4 seats, and Independents 5 seats. The ruling South African Party had to rely on the Unionists for support. Krüger A Nation op cit 103; and Kennedy & Schlosberg op cit 143-44.

36. Krüger A Nation op cit 114-116.

37. In a House of 134 members, the National Party obtained 44 seats, the Prime Minister's South African Party received 41 seats; the Unionists won 25 seats; Labour was elected in 21 seats, and the Independents took 3 seats. Kennedy & Schlosberg op cit 144; or Krüger A Nation op cit 114.

38. General Smuts could rely on the support of the three Independents, but he also needed the Unionists. The National Party and the Labour Party often voted together, but this total still only made 65 seats. Krüger A Nation op cit 114; or Kennedy & Schlosberg op cit 144. To begin with, the South African Party government struggled on, assisted by the Unionists and erratic support in the Labour Party. In September 1920, the Prime Minister's Party attempted a reconciliation with the National Party, but this broke down. Eventually, in November 1920, a merger between the South African Party and the Unionists was agreed. Kennedy & Schlosberg op cit 144; Worrall op cit 194; or Krüger A Nation op cit 114-116.

39. In 1915 for example, General Botha had to replace one of his Cabinet Ministers who had lost his seat in the 1915 elections. Three Ministers actually lost their seats. Krüger op cit 103. They were the Minister of Justice (N J De Wet), the Minister of Railways (H Burton), and the Minister of Lands (H S Theron). Two of these Ministers were almost immediately re-elected to Parliament in by-elections, but Mr H S Theron was not. He ceased to be Minister of Lands on November 22nd 1915, and was subsequently replaced by Colonel H Mentz. Parliamentary Register 1910-1961 17-18 & n9; 77; 83; and the 'Cape Times' 25th and 27th October 1915. General Botha also made other Ministerial changes. Parliamentary Register 1910-1961 17-18.

40. Kennedy & Schlosberg op cit 144.

41. The combined South African Party and Unionist Party vote gave him 66 seats. He needed to rely on the Independents to give him the controlling 68 votes in a House of 134 members.

42. Keith The Dominions op cit 245-246, and Worrall op cit 191.

43. South Africa Act 1909 s 14. See Ch 2 op cit n15 supra.

44. There would be circumstances under which, however, the Prime Minister and his colleagues would be obliged to resign. Ch 3 op cit 46-48 infra.

45. Keith The Dominions op cit 246.

46. Ibid; and n43 supra.
47. VerLoren Van Themaat 2ed op cit 156 & n32 infra.
48. Keith The Dominions op cit 246; Worrall op cit 191; or VerLoren Van Themaat 2ed op cit 156 n32.
49. Keith The Dominions op cit 246. At 245 Keith has asserted: 'The Premiers' resignation ... dissolves the ministry in the sense that ministers merely hold office until they are either relieved by the appointment of others, or are asked by the new Premier to remain at their posts or to accept other offices.'
50. Ibid; Worrall op cit 191; and VerLoren Van Themaat 2ed op cit 156 n32. The former Prime Minister would again be commissioned to form a government, because he still commanded a working majority in the House of Assembly. VerLoren Van Themaat 2ed op cit 156 n32.
51. Keith The Dominions op cit 246; Worrall op cit 191; and VerLoren Van Themaat 2ed op cit 156 n32.
52. N51 supra. The background to the clash between Generals Botha and Hertzog is discussed in Worrall op cit 188-191; and Krüger South African Parties and Policies 1910-1960 61-67.
53. Keith The Dominions op cit 246. The reasons which justified the dismissal of Walter Madeley, are described by Krüger. Krüger A Nation op cit 154-155; or Parliamentary Register 1910-1961 20-21; and the 'Cape Times' November 6th and 7th 1928. The 'Cape Times', on 7th November 1928, reported the events as follows:
'The political crisis ended with the resignation of the Government at noon yesterday and its immediate reconstruction, Mr W B Madley, Minister of Posts and Telegraphs, being replaced by Mr H W Sampson...'
The report went on to recite the events of the previous day as follows:
'The Prime Minister waited until noon for the ex-Minister's resignation. Instead he got a telegram from Mr Madley inquiring the reasons for the urgency. General Hertzog immediately handed his own resignation to His Excellency Sir William Solomon, the Officer Administering the Government, and his Cabinet automatically went out of office. He was immediately requested to form another Administration, and at once submitted a list of names to His Excellency. The following official statement was issued in the afternoon by the office of the Prime Minister:

> "After a Cabinet meeting the Prime Minister gave Mr W B Madley, Minister of Posts and Telegraphs, until 12 noon to-day to resign. On the resignation not being received, General Hertzog tendered the resignation of his Cabinet to the Officer Administering the Government, Sir William Solomon. The Acting Governor-General asked General Hertzog to form a new Ministry. The new Administration was sworn in at 3pm this afternoon. Mr H W Sampson OBE MLA replaces Mr W B Madley as Minister of Posts, Telegraphs and Public Works."'

Strictly speaking, the dismissal of W B Madeley should not

be mentioned at this stage, as the current section of this chapter is only covering the period up to 1926. It is being mentioned here for convenience and clarity, although at some cost to structural consistency. NB The Minister's name has been spelt incorrectly by the 'Cape Times'.

54. The resignation of the Prime Minister and his colleagues is examined under a separate heading. Ch 3 op cit 46-48 & n116 supra.
55. Ch 3 op cit 33 supra.
56. N54 supra.
57. Ibid. Reasons for obedience to convention will be examined in Ch 6 and Ch 7 infra.
58. Ch 2 op cit 16-17 & nn28-38 supra.
59. The importance of s 13 of the South African Act 1909 is explained in Ch 2 op cit 13-14 & nn14-21 supra. The Interpretation of Laws Act is looked in Ch 2 op cit 17; & nn21 & 38 supra.
60. Ch 2 op cit 16-17 supra.
61. Ch 3 op cit 32-34 & nn7-16 supra. The Executive Council was not filled with rubber-stamp nominees of the Governor-General. It was filled with past and present Ministers of State, who would have been selected by past and present Prime Ministers of the Union.
62. Ch 3 op cit 34-39 supra.
63. Ch 2 op cit 16 & n32 supra.
64. VerLoren Van Themaat 2ed op cit 160 & n50.
65. Evatt The King and His Dominion Governors 175 who quotes Keith as follows:
'To intimidate the strikers he decided to deport without legal authority ten leaders ... The step taken was wholly illegal ... It was found that General Smuts had admitted that he had had recourse to the illegal deportation because he knew that Parliament would never give him authority in cold blood to expel the men in question.'
The background to the industrial unrest of 1913-14 is described by Krüger. Krüger A Nation op cit 74-75.
66. Evatt op cit 176. Indemnity Acts are described in Krohn V The Minister For Defence And Others 1915 AD 191 per Innes C J at 197-198, and in Welsh 'Martial Law' (1941) 58 SALJ 111 at 120-121.
67. Keith The Dominions op cit 66.
68. Evatt op cit 175.
69. Prior to 1926, the analogy was inaccurate in relation to the Govenor-General's position concerning the dissolution of Parliament. Ch 3 op cit 42-45 infra.
70. Ch 2 op cit 21-23 supra. The Governor-General was an appointee of the Imperial government, and he was bound to follow any instructions which it chose to give him. The Imperial government could have instructed the Governor-General to veto the Indemnity Bill.
71. Maitland The Constitutional History of England 423; Wade & Phillips op cit 17; 228-229; and VerLoren Van Themaat 2ed op cit 160.
Wade & Phillips op cit 17 note than when Queen Anne refused the assent to the Scottish Militia Bill, this was apparently

done with the approval of her Ministers and without objection from Parliament.

72. Evatt op cit 176.
73. Keith The Dominions op cit 225-226.
74. Op cit 225.
75. Ibid.
76. This can be deduced from general remarks of Keith which were applicable to all the Dominions. Keith Dominion Home Rule in Practice 9:
'The vast authority of the Governor is exercised, by constitutional law or custom, on the advice of his ministers, who are responsible to Parliament for the advice which they tender to him.'
77. The provisions of the South Africa Act gave the Governor-General legal authority to summon and prorogue Parliament without the advice of his Union Ministers. Ch 2 op cit 16 & n33 supra. On the other hand, under the Letters Patent of 1909, the Governor-General could be obliged to summon or prorogue Parliament on instructions from the Imperial government in London. Ch 2 op cit 22-23 & n69 supra. Hence, legal provisions could oblige the Governor-General to follow British Ministerial advice, but not South African Ministerial advice.
78. N76 supra. In relation to the pardon or reprieve of offenders in Capital cases, the Governor-General had specific authority to act 'according to his own deliberate judgment'. See, Royal Instructions of 1909 paragraph IX as follows:
'Whenever any offender shall have been condemned to suffer death by the sentence of any Court, the Governor-General shall consult the Executive Council upon the case of such offender ... The Governor-General shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise ...'
Kennedy & Schlosberg op cit 125-126.
79. Keith The Dominions op cit 219-220; and Wheare The Statute of Westminster and Dominion Status 57, who says vis-à-vis a Governor's discretion to refuse advice:
'This doctrine of discretion was not always accepted by colonial minsters and its exercise gave rise to numerous controversies, chiefly upon the question of the grant of dissolution. It was discussed in relation to this question at the Colonial Conference in 1887 and a majority of the colonial premiers approved it'.
80. Keith The Dominions op cit 222-223, & n86 infra. A proviso must be added however. Only one dissolution could be asked for by the same minority within a limited period; if it failed to secure a majority at a dissolution, it could not endeavour to secure a compliant legislature by a series of dissolutions. The King, in such instances, would be

entitled to refuse such dissolutions. VerLoren Van Themaat 2ed op cit 157; and Keith The Dominions op cit 223. The King's discretionary power to act without advice is discussed in greater detail. Ch 3 op cit 55-58 & n193 infra.

81. Keith The Dominions op cit 220.
82. Keith Dominion Home Rule op cit 9-10.
83. Op cit 9.
84. Op cit 9-10.
85. In 1926, the actions of the Canadian Governor-General were clearly repudiated by the electorate. Keith The Dominions op cit 221.
86. Jennings Cabinet Government op cit 328-343; especially 335-339. At 338 he quotes from the memorandum of Lord Esher, drawn up during the Home Rule crisis of 1912-1914, which said as follows:
'Ministerial responsibility is the safeguard of the monarchy. Without it, the throne could not stand for long, amid the gusts of political conflict and the storm of political passion ...
In the last resort the King has no option. If the constitutional doctrines of ministerial responsibility mean anything at all, the King would have to sign his own death-warrant, if it was presented to him for signature by a minister commanding a majority in Parliament. If there is any tampering with this fundamental principle, the end of the monarchy is in sight ...'
Cf n185 infra. The King would be unwise to enter into a political conflict with his Ministers, even if they lacked a majority in the elected House of Parliament. Jennings Cabinet Government op cit 339; and Ch 3 op cit 56-58 infra.
87. Kennedy & Schlosberg op cit 143-144. The first elections for the Union Parliament were held on 15th September 1910. The next election was held on October 20th 1915. The third general elections were held in March 1920. Ibid.
The maximum five year life-span for the House of Assembly was set out in s 45 of the South Africa Act 1909. See Ch 2 op cit n33 infra.
88. General Elections were held in February 1921. Kennedy & Schlosberg op cit 144.
89. Nn37 & 38 supra.
90. Kennedy & Schlosberg op cit 144 notes that the Unionists were anxious to maintain the Imperial connection, while the Nationalists wanted an independent South Africa. Between 1915 and 1920, the Unionists consistently supported the South African Party. Ibid. After the 1920 elections, the Unionist and South African Parties merged. Ibid.
91. General Elections were held in June 1924. Kennedy & Schlosberg op cit 144.
92. Prior to the 1924 elections, the South African Party of General Smuts held 79 seats; the National Party of General Hertzog held 45 seats; the Labour Party held 9 seats; and the Independents held one seat. Kennedy & Schlosberg op cit 144.
93. Constitutional conventions in the United Kingdom and South

Africa may have differed from each other in one respect however.
In the United Kingdom, prior to 1918, it was the convention that advice to dissolve Parliament was tendered to the Sovereign by the Prime Minister, who acted on behalf of the Cabinet. Due to error, this convention was disregarded after 1918, and it has become the subsequent practice for the Prime Minister to act without the assent of the Cabinet. Jennings Cabinet Government op cit 417-419. In the Dominions as late as 1940, it was still not settled whether the Prime Minister or the Cabinet had the final say about requesting a dissolution of Parliament. Keith 'The War and the Constitution' (1940-'41) 4 MLR 1 at 6.
In South Africa however, it is known that General Smuts requested a dissolution in 1924, without reference to his colleagues in the Cabinet. Krüger A Nation op cit 134.

94. Ch 2 op cit 21-23 supra.
95. Ch 3 op cit 40-45 supra.
96. Keith The Dominions op cit 228.
97. Ibid. The nature of Martial Law is reviewed by Welsh. See Welsh (1941) SALJ op cit 111 at 111-113. The right of the State to use all force necessary to protect itself from internal or external attack is an inherent one, based on the law of self-defence or necessity. Ibid; Queen v Bekker and Naudé 1900 SC 340 per Solomon J at 355-356; and Krohn v The Minister for Defence and others 1915 AD 191 per Innes C J at 197-198. Martial law may give rise to incidental illegalities. This was explained by De Villiers A J A in the Krohn case at 211:
'As necessity, then, affords the only excuse, the powers of the Crown and its officials are limited both as to their extent and their duration by the necessity of the case. Any excess beyond what the necessity of the case demands is punishable.'
See also Innes C J at 198.
98. On 12th October 1914, Martial Law was declared by the new Governor-General, Lord Buxton, in terms of Proclamation No 219 of 1914. See also Krohn v The Minister of Defence and others 1915 AD 191 per Innes C J at 195; and per Solomon J A at 205. It is clear however, that Lord Buxton acted on Ministerial advice, because the proclamation was countersigned by General Smuts below the words 'By Command of His Excellency the Governor-General-in-Council.' Years later, Lord Buxton confirmed that he had acted on the advice of the Cabinet. Earl Buxton General Botha 55.
99. The 1939 dissolution crisis will be examined separately. Ch 3 op cit 68-82 infra. On the whole, the relationship between the Governor-General and his Ministers were pleasant, almost cordial. General Botha and Lord Buxton for example, had numerous, almost daily, informal discussions. Mandelbrote in Walker (ed) The Cambridge History of the British Empire Vol VIII South Africa 705. On one occasion however, it is known that Lord Buxton deliberated with his Ministers at a Cabinet meeting, when peace terms with German South-West Africa were being discussed. Op cit 705 & n8.

Mandelbrote also notes that occasionally Lord Buxton would consult John X. Merriman and other influential private members, the constitutional correctness of which is to be doubted. Op cit 705. There is no suggestion however, that this led to clashes between the Governor-General and his Ministers.

100. Lord De Villiers established a tradition that the Chief Justice of South Africa filled the position of Acting Governor-General. Kennedy & Schlosberg op cit 123.

101. N97 supra; Ex parte Marais 1902 AC 109 per Halsbury L C at 114-115, who at 115 says:
'The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.'
See also Krohn v The Minister of Defence and others 1915 AD 191 per De Villiers A J A at 212.

102. This is discussed by Keith in a general context which could be applied to all the Dominions of that period. Keith The Dominions op cit 248-249. In relation to South Africa, see n105 infra.

103. Keith The Dominions op cit 248-249.

104. Nn37-38 supra; Kennedy & Schlosberg op cit 144.

105. Keith The Dominions op cit 251. With specific reference to this convention in South Africa, Kennedy & Schlosberg op cit 141 have said:
'The ministers hold office during the governor-general's pleasure; that is, during the pleasure of parliament: if the ministers cannot command the confidence of the legislature, the prime minister informs the governor-general of this fact, and either he advises the governor-general to dissolve parliament, or he resigns, and may advise the governor-general to send for the leader of the opposition. If the latter is prepared to form a government, he in due course submits the names of his proposed ministers to the governor-general ...'

106. Ch 3 op cit 37 & nn33-35 supra.

107. N35 supra.

108. Kennedy & Schlosberg op cit 143-144; or Krüger A Nation op cit 103.

109. Ch 3 op cit 37 and nn36-38 supra.

110. For the results of the 1920 elections, see n37 supra. General Smuts had the support of the Unionists and the Independent members in the House of Assembly. The combined strength of the National Party and the Labour Party was insufficient to outvote General Smuts' supporters. N38 supra.

111. Krüger A Nation op cit 134.

112. Op cit 133-134.

113. Op cit 134; Worrall op cit 197; or Kennedy & Schlosberg op cit 144.

114. N113 supra.

115. Krüger A Nation op cit 134.

116. Ibid. General Hertzog was thereby able to form an administration by some form of coalition or working agreement with the Labour Party.

It should be remembered that when the Governor-General called upon General Hertzog to form a new administration, the General commanded only 63 seats in the House of Assembly. Krüger A Nation p cit 134. General Hertzog was not a leader of a majority party in the lower House. The decision of the Governor-General was an appropriate one however, because General Hertzog could rely on the Labour Party to give him an effective majority. See generally, Keith The Dominions op cit 251-252.

117. A more detailed analysis of collective responsibility is provided by Jennings. See Jennings Cabinet Government op cit 277-289; Wade & Phillips op cit 99-102; and MacIntosh The British Cabinet 531.
In South Africa, it has been assumed that collective responsibility is a mere reflection of the equivalent constitutional convention in the United Kingdom. Kennedy & Schlosberg op cit 142; or VerLoren Van Themaat 2ed op cit 159. This assumption is suspect. See Ch 7 op cit 215-218 infra.
118. Jennings Cabinet Government op cit 277-278; Wade & Phillips op cit 100; and VerLoren Van Themaat 2ed op cit 159.
119. Jennings Cabinet Government op cit 278, 282--284; Wade & Phillips op cit 100; and VerLoren Van Themaat 2ed op cit 159.
120. Wade & Phillips op cit 100; VerLoren Van Themaat 2ed op cit 159.
121. Jennings Cabinet Government op cit 277; and VerLoren Van Themaat 2ed op cit 159. MacIntosh The British Cabinet op cit 531 has said:
'... all members of a government are expected to be unanimous in support of its policies on all public occasions. This is in part because divergence among leading members of a government afford such wonderful openings to its opponents and are such evidence of disharmony that they cannot be tolerated. But there was and is a feeling that men working together to guide national affairs ought either to be in sufficient agreement to give genuine advocacy to collective decisions (despite differences at the formative stage) or should resign.'
122. Krüger A Nation op cit 63.
123. Op cit 63-64; and Worrall op cit 187-190.
124. Krüger A Nation op cit 63-64. The South African Party was formally created more than a year after the elections of 1910. Worrall op cit 190.
125. Krüger A Nation op cit 64.
126. Ibid.
127. Ibid.
128. Ibid; and MacIntosh at n121 supra.
129. Krüger A Nation op cit 64.
130. Since 1908, the education policy of the Orange River Colony (and later the Orange Free State) had provided for mother tongue instruction in schools, up to Standard Four. In the more senior Standards of the school system, the other official language was gradually introduced, as a medium of instruction in three subjects. The policy can best be

described as one of mother tongue instruction with an element of forced bi-lingualism. Krüger A Nation op cit 58. The policy was enormously controversial, and the Prime Minister decided to refer the whole matter to a Parliamentary Select Committee. Worrall op cit 189 & 190; and Krüger A Nation op cit 57-58. The Select Committee rejected the education policy of the Free State. Worrall op cit 190. The majority report recommended that teachers should not be forced to qualify in both languages, that children should be educated on their mother tongue up to Standard Four, and that thereafter, parents should be allowed to choose the medium of instruction. Krüger A Nation op cit 58.
The South African Party Caucus accepted the majority report. Krüger op cit 58-59. Hertzog concealed his disappointment and accepted the majority report for the sake of peace. Worrall op cit 190. The convention of Collective responsibility was severely strained by the language dispute nonetheless. Although Hertzog signed the majority report of the Select Committee, he could scarcely conceal the contempt he felt for its views. At one stage, he contemplated resignation. Van Den Heever General J B M Hertzog 142-143. Hertzog went so far as to declare in Parliament that the minority report was 'far more in accordance with the requirements of the Union' than the majority report. Ibid. His resignation was only averted when the Cabinet agreed in writing that he would not have to oppose the minority report in or out of Parliament. Op cit 143.

131. Krüger A Nation op cit 64-65; Worrall op cit 189 & 190-191.
132. Krüger A Nation op cit 65. The Prime Minsiter privately agreed with much of what Hertzog said. Worrall op cit 191. He was afraid however, that the South African Party would lose support if his Cabinet colleague failed to be more circumspect in public. Krüger A Nation op cit 65; or Worrall op cit 191.
133. Krüger A Nation op cit 65; and Worrall op cit 190-191. For the content of the Smithfield and De Wildt speeches, refer to Krüger South African Parties and Policies op cit 63-67.
134. Krüger A Nation op cit 66.
135. Ibid.
136. Ibid.
137. Ibid; or Worrall op cit 191.
138. N137 supra.
139. Krüger A Nation op cit 67-69.
140. Ch 3 op cit 47-48 & nn111-115 supra.
141. The Cabinet included three Ministers who were drawn from the Labour Party. Ch 3 op cit 48 & n116 supra.
142. Malan The Cambridge History of the British Empire op cit 662.
143. Ch 3 op cit 49 & nn123-124 supra.
144. Tielman Roos was the leader of the National Party in the Transvaal. Krüger A Nation op cit 137.
145. Malan The Cambridge History of the British Empire op cit 662.
146. There was little resemblance between the Executive Council

of the Orange Free State or of the South African Republic, and the Westminster Cabinet system. The political influence of the republican Executive Councils was weak, and they were easily dominated by the respective Presidents of each of the two States. Hahlo & Kahn The Union of South Africa: The Development of its Laws and Constitution 81; & 98-100 cf. Malan The Cambridge History of the British Empire op cit 661-662.

147. Krüger A Nation op cit 154-155. Two Cabinet Ministers, Creswell and Boydell, were among the Labour members of Parliament who were expelled from the party by the National Labour Council. The third Labour Cabinet Minister, Madeley, continued to support the National Council. Ibid.
148. Op cit 155; or n53 supra.
149. Krüger A Nation op cit 155.
150. N147 supra.
151. N53 supra.
152. Ibid.
153. Wheare The Statute of Westminster op cit 21-29; and VerLoren Van Themaat 2ed op cit 199.
154. VerLoren Van Themaat 2ed op cit 199-200.
155. Op cit 200 and 564.
156. By 1926, the word 'Dominion' was the accepted term to describe a self-governing colony such as the Union of South Africa. Wheare The Statute of Westminster op cit 21-24; and Ch 1 op cit n34 supra.
157. Wheare The Statute of Westminster op cit 34-35; and VerLoren Van Themaat 2ed op cit 200-201.
158. VerLoren Van Themaat 2ed op cit 201; and Ch 2 op cit 21-23 supra.
159. VerLoren Van Themaat 2ed op cit 565; Keith The Dominions op cit 63; or May op cit 39.
160. Wheare The Statute of Westminster op cit 55-61; & 126. Indeed, the resolution is plagued with difficulties. N201 infra.
161. Wheares' views are to be found in Wheare The Statute of Westminster op cit 56-57. Keiths' views are to be found in Ch 3 op cit 42-43 supra.
162. Wheare The Statute of Westminster op cit 57-58; 126; and Jennings Cabinet Government op cit 414-417; & 539-545. Closely associated with the dissolution question was the controversy about whether or not the King could dismiss his Ministers. Jennings Cabinet Government op cit 403-412; 413; 415; & 416. The dissolution and dismissal issues are referred to in more detail. Ch 3 op cit 53-60; & nn162-165; n168; & nn170-195 infra.
163. Ch 3 op cit 42-43 supra. Keith seems to have vacillated several times however, about whether or not the King could act without his Ministers' advice. Markesinis The Theory and Practice of Dissolution of Parliament 70-71; 85 & n2.
164. Wheare The Statute of Westminster 57-58.
165. Op cit 58; 61; & 126.
166. Keith The Dominions op cit 222.
167. Op cit 220-222. Keith viewed Lord Byng's actions as being entirely unconstitutional ie a breach of convention. Op cit

221. Keith regarded the Governor-General's actions as unconstitutional, because he was unable to secure a Ministry which was able to carry on without a dissolution. Ibid. It should be noted that the views Keith expressed in 1938 about the Canadian crisis were not the same as those he had expressed in 1927. The views he expressed in his book 'Responsible Government in the Dominions' were criticized for being inherently contradictory. Wheare The Statute of Westminster op cit 58-59. Keith's later views anticipated criticism of the sort which was soon to be made by Wheare.

168. Keith The Dominions op cit 222. Although Keith insisted that the King would have to dissolve Parliament whenever advised to do so by his Ministers, this was subject to a proviso. N80 supra. This proviso would also apply to the Governor-General of a Dominion after 1926.

169. Wheare The Statute of Westminster op cit 126. The main intention of the resolution however, was to end the dual nature of the Governor-General's functions. Adoption of the resolution meant that the Governor-General was no longer a representative or an agent of the Imperial government in London. Op cit 35-36; 126; and VerLoren Van Themaat 2ed op cit 201.

170. Wheare The Statute of Westminster op cit 126.

171. N162 supra. The background to the Home Rule Crisis, and all the constitutional issues which it involved, are well explained by Markesinis op cit 63-71; and Jennings Cabinet Government op cit 395-400.

172. Wheare The Statute of Westminster op cit 57. Sir William Anson's letter to 'The Times', dated 10th September 1913 is reproduced in Jennings Cabinet Government op cit 541.

173. Sir William Anson's views were backed up by Dicey. Jennings Cabinet Government op cit 396 & 544.

174. The letter, dated 10th September 1913, is reproduced in Jennings Cabinet Government op cit 541-543.

175. N173 supra.

176. 'The Times' leading article of 8th September 1913 is reproduced in Jennings Cabinet Government op cit 540.

177. Among such 'reserved rights' are:
(a) the power to appoint the Prime Minister without advice;
(b) " " " dismiss Ministers without advice;
(c) " " " dissolve Parliament without advice, and to reject a request for dissolution;
(d) " " " refuse the assent to legislation;
(e) " " " refuse a request for the creation of Peers to over-ride opposition in the House of Lords.

Jennings Cabinet Government op cit 394-396. He refers to these 'reserved rights' as the 'personal prerogatives', while conceding that the practical extent of these powers is the subject of considerable dispute. Op cit 394. These legal powers are now superceded to a considerable extent by non-legal, conventional rules of the Constitution. Ch 1 op cit 3-5 & nn14-33 supra. The development of constitutional convention explains why 'The Times' article refers to the legal powers of the King as 'atrophied by long disuse'. At

the heart of the controversy about the 'reserved' legal rights of the King is the argument about whether they can be exercised without a violation of convention.

178. Cf the letter of Lord Hugh Cecil to 'The Times', which is quoted in Jennings Cabinet Government op cit 542-543, and which counter-argued as follows:
'In what circumstances it may be wise for the Sovereign to exercise his constitutional right is quite another question. What is constitutional is not always judicious ... But what may briefly be called the 'automatic' theory [that the King must follow the advice of his existing Ministers] is a serious misrepresentation of the Constitution ... For that theory mistakes the underlying principle of which the conventions of the Constitution are the expressions. That principle is that there must be no conflict between the King and his people, nor consequently between the King and a House of Commons which correctly represents his people. But there is nothing unconstitutional in a disagreement between the King and his Ministers except in so far as it implies a disagreement with the House of Commons and ultimately with the people. The constitutional rules which I have endeavoured to state [Ch 3 op cit 55-56 supra] do three things: they absolutely prevent a conflict between the King and the people; they prevent a conflict between the King and the House of Commons except in the case where both he and experienced advisers see reason to doubt that the House of Commons really represents the people; and in the event of such a conflict they require the King to protect the dignity of his office from all controversy or censure by interposing a ministry to bear the whole responsibility for what has been done.'
These views reflect the opinions of Dicey which are quoted in Jennings Cabinet Government op cit 407; See further, Dicey op cit 432-437; & 453-454. There is a major flaw in Lord Hugh Cecil's ideas however. He assumes that the King and his most trusted advisers can accurately gauge the point at which the government and House of Commons have lost the support of the electorate. This is a sweeping assumption which needs to be justified. Jennings Cabinet Government op cit 410-411; 415-417; and Markesinis op cit 67-68; & 70-71.

179. The letter written by J.H. Morgan to 'The Times', dated 10th Septemter 1913, is reproduced in Jennings Cabinet Government op cit 543-544.

180. The Prime Minister's memorandum is reprinted in Jennings Cabinet Government op cit 408. Asquith explained his opposition to the exercise of the King's legal powers in the following terms:
'If, on the other hand, the King were to intervene on one side, or in one case - which he could only do by dismissing ministers in de facto possession of a Parliamentary majority - he would be expected to do the same on another occasion, and perhaps for the other side. Every Act of Parliament of the first order of importance, and only passed after acute controversy, would be regarded as bearing the personal imprimatur of the Sovereign. He would, whether he wished it

or not, be dragged into the arena of party politics; and at a dissolution following such a dismissal of ministers as has just been referred to, it is no exageration to say that the Crown would become the football of contending factions.'

181. Ibid. This memorandum was one of the most successful documents which the Prime Minister ever drafted, and in Professor Wilson's words contained 'the orthodox view of the position of a constitutional Monarch in the twentieth century.' Markesinis op cit 68.
182. N180 supra.
183. Jennings Cabinet Government op cit 426, who quotes the views of Lord Esher approvingly.
184. Jennings refers to Lord Esher, who has said that George V refused a dissolution in November 1910 and that Herbert Asquith and his Cabinet decided to resign. The King subsequently agreed to grant the dissolution. Op cit 414-415.
185. Jennings clearly supported Morgan's point of view. Jennings Cabinet Government op cit 409-411; & 416-417. Markesinis op cit 71 has said:
'Forsey, Evatt, Laski, Wilson, Keith, Morgan and Jennings all agree that a forced dissolution would have resulted in a dismissal of the Liberal Government in 1913 which would have been extremely dangerous to the Crown.'
For the personal views of Markesinis, see Markesinis op cit 55; 65-67; 69-70; & 70-71. Lord Esher, who was advising George V during the Home Rule Crisis, underwent a change of heart however. At first, he argued that the King had no option but to obey Ministers commanding a majority in Parliament. Jennings Cabinet Government op cit 337-338. As the crisis deepened, he changed his mind and thought that the King ought to dismiss his Ministers. Op cit 399; & 416-417. He argued that it might become necessary for the King to dismiss his Ministers 'at the moment when armed conflict was recognised to be inevitable.' Op cit 416.
186. Jennings Cabinet Government op cit 408-409.
187. Op cit 399-400; 409; and Markesinis op cit 69. The King's ideas were developed further by later writers. It was argued that the King could exercise his residuary legal powers if this helped to protect the 'democratic' essentials of the constitution. De Smith Constitutional and Administrative Law 122-129; and VerLoren Van Themaat 2ed op cit 157. De Smith recognized of course, that the exercise of these powers could destroy the Monarchy, and that decisions had to be based on the 'lesser of two evils.' De Smith Constitutional and Administrative Law op cit 123-124. These views have not been universally accepted however. VerLoren Van Themaat 2ed op cit 157 n36.
188. Markesinis op cit 87. Dicey and Anson did not subscribe to this view however. Op cit 86-87. Nor do Beloff or King, who argue that the Sovereign must automatically grant a request for the dissolution of Parliament. Op cit 91.
189. Markesinis explores this subject, with reference to the 1924 and 1926 dissolutions, which took place in the United Kingdom and Canada respectively. Markesinis op cit 86-94.

190. Op cit 91-92.
191. Op cit 92. Keith elaborates upon this observation, with reference to the grant of a dissolution to the minority Labour Government of Ramsay MacDonald in 1924:
'If a dissolution had been refused, it is certain that the propriety of the King's action would not have been appreciated, and the idea would have been broadcast in the ranks of the electorate that the King had taken the earliest possible moment to rid himself of a Labour ministry, and had refused it the right to appeal to the electors ... The Crown would have been bitterly assailed ... and the unique opportunity would have been lost of showing to the Labour party that from the King it could expect absolutely fair and impartial treatment in all essentials.'
Quoted in Markesinis op cit 92. Similar sentiments were expressed by Lord Esher. Ibid.
192. Ibid.
193. De Smith has inferred that it would be improper for the Prime Minister to request a dissolution of Parliament, if the country was on the verge of a major military defeat in wartime. In such circumstances, the Sovereign would be justified in refusing a dissolution, regardless of whether the government enjoyed majority or minority support in the House of Commons. De Smith Constitutional and Administrative Law op cit 125-126.
Lord Simon has argued that a minority government cannot expect a dissolution to be automatically granted, if the most recent general poll was held comparatively recently. Markesinis op cit 91-92. VerLoren Van Themaat holds a similar opinion, along with Keith. N80 supra.
194. For the personal views of Markesinis, see Markesinis op cit 55; 65-67; 69-70; & 70-71.
195. N185 supra.
196. The procedure which used to be followed in the appointment of Governors-General is explained separately. Ch 3 op cit 96-98 infra. For the 'rules' relating to the appointment of an hereditary Monarch, see De Smith Constitutional and Administrative Law op cit 130-131.
197. Ch 3 op cit 43 & nn82-86 supra.
198. Ch 3 op cit 54-55 & n170 supra. This problem is referred to again, in a different context. Ch 3 op cit 65-68 infra.
199. Ch 3 op cit 55-58 supra.
200. Ch 1 op cit 1-6; Ch 2 op cit 12; and Ch 3 op cit 32; 41; & n68 supra.
201. Ch 3 op cit 52-53 supra. The exact meaning of this intention is full of difficulty however. Firstly, it is inherently ambiguous. Ch 3 op cit 58-60 supra. Secondly, it is closely tied up with the quest for equality of status among all members of the Commonwealth and is thus primarily concerned with intra-Imperial relations. Ch 3 op cit 65-68; & nn225 & 234 infra.
202. Markesinis op cit 72.
203. A clear departure from practice occured in 1868, when Disraeli asked for a dissolution of Parliament without referring his request to the Cabinet. Markesinis op cit 73-

74. Other, less clear examples may also be cited. Op cit 72-73.
204. Op cit 72.
205. Op cit 74.
206. Herbert Asquith had resigned the Premiership. Ibid. The King sent for the leader of the Opposition, in accordance with constitutional precedent. Ibid.
207. Ibid.
208. Ibid.
209. Ibid; and MacIntosh The British Cabinet op cit 362-363; 380 & 382.
210. Markesinis op cit 74-75.
211. Op cit 75.
212. Ibid; MacIntosh The British Cabinet op cit 382; and Jennings Cabinet Government op cit 418-419.
213. On the 18th October 1924 the minority Labour government of Ramsay MacDonald was defeated on an issue of confidence. On the same day, the Cabinet agreed that the Prime Minister should seek a dissolution from the King. Markesinis op cit 77-78; or MacIntosh The British Cabinet op cit 454.
214. Markesinis op cit 82.
215. Viscount Buxton was Governor-General of South Africa from 8th September 1914 until 3rd September 1920. Parliamentary Register 1910-1982 5. General Elections were held during his term of office, on 20th October 1915, and 10th March 1920. Op cit 331.
216. Buxton op cit 203-204.
217. Krüger A Nation op cit 133-134.
218. Crafford Jan Smuts - a biography 231-232; Van Der Poel (ed) Selections from the Smuts Papers Vol V 224 &n2; and Van Den Heever op cit 204.
219. Crafford op cit 231-232.
220. Ibid.
221. It looks as though Smuts was the main force behind the decision to call elections in 1921. Worrall op cit 194; and Crafford op cit 197. The lack of an adverse reaction would suggest however, that the Prime Minister had consulted at least some of his Cabinet colleagues. It is not certain whether the ultimate decision rested with the Prime Minister, or with the Cabinet.
222. Ch 3 op cit 53 supra.
223. Wheare The Statute of Westminster op cit 126.
224. The war emphasised the special position of the British Prime Minister, which was clearly above the rest of the Cabinet. Ch 3 op cit 61-62; & nn209-211 supra. The introduction of universal male suffrage in 1918, with its concomitant strengthening of the party political system, further enhanced the position of the Prime Minister. MacIntosh The British Cabinet op cit 414-415. The rise of the Prime Minister had started however, long before the First World War, and can be traced back to developments since the 1870s. Op cit 308-321. The King would have to take account of such developments when acting on advice.
225. Wheare The Statute of Westminster op cit 34.
226. Op cit 30-32; 34; 35-36; 38; and VerLoren Van Themaat 2ed op

cit 201. According to Wheare, the attempt to equate the relationship between a Governor-General and his Cabinet to the relationship between the King and the United Kingdom Cabinet was misguided. The Conference had been reacting to events in Canada, where the Governor-General had refused a dissolution to one Prime Minister while granting it almost immediately thereafter to another. The Canadian Prime Minister had felt that because the Canadian Governor-General had not acted in relation to his Ministers in Canada as the King would have acted in relation to his Ministers in the United Kingdom, therefore Canada was unequal in status to the United Kingdom. Wheare disputes the Canadian Prime Minister's assumption. He has said: 'Provided there was no external control the alleged fact that Lord Byng acted differently in Canada from the King in the United Kingdom is not more relevant to the question of equality of status than would be the fact that Lord Byng acted differently from the President of France in similar circumstances. Identity of structure is to be distinguished from equality of status.' Wheare The Statute of Westminster op cit 25; 30; 31 & n1; 32; & 60-61. Cf Keith The Dominions op cit 220-222. Accordingly, equating the position of a Govenor-General with the position of the King must be seen in the context of a misguided attempt to end a perceived inequality. The Conference resolution must be read, bearing this factor in mind.

227. Even in the Conference's misguided attempt to restrict the Governor-General's 'reserve' power to refuse a dissolution, it was singularly unsuccessful. N231 infra.

228. Ch 1 op cit 10 supra.

229. Op cit 1-6; and Ch 2 op cit 12 supra.

230. De Smith The New Commonwealth and its Constitutions 77-82. Perhaps the most unusual aspect of the South African constitution at Union was its treatment of the parliamentary franchise. The analysis of the subject by Kennedy & Schlosberg speaks volumes for the peculiar political conditions in South Africa in the years after Union. Kennedy & Schlosberg op cit 62-64. They have remarked:
'There is, in the first place, the pure-blooded Kaffir, or Bantu, or, as he is commonly called, the native. In South Africa the problem of the native in his relation to the white man is one to which there has been no parallel in the experience of mankind ... The white man thinks that after the terrible struggles and privations which he has endured in order to build up a modern civilisation in Africa, he ought never to allow himself to be placed in such a position that the numerical superiority of the natives will overwhelm him and the civilisation which he has laboured to establish ... In South Africa problems of government are intensified by the clash of interests between different races. The simple expedient of applying the principle of equality means that if all adult whites possess the franchise, all adult natives must equally possess the franchise ... It means that the centuries of culture, of traditon, of knowledge, and of political accomplishment will be worth one-fifth in

the government of the country as compared with the almost barbaric state, the superstitious beliefs, the crudeness and the childishness, of the native masses.'
Op cit 62-63.

231. Ch 3 op cit 58-60 supra.
232. The conventional practices in the United Kingdom were not very consistent in the years immediately prior to the 1926 Conference. In 1924 for example, the decision to advise a dissolution of Parliament was taken by the whole Cabinet, and not by the Prime Minister alone. N213 supra. Accordingly, the Dominions were presented with conflicting British precedent; they could satisfy one but not the other.
233. Take for example, a British precedent from 1931. The decision to dissolve Parliament in 1931 was taken by the entire British Cabinet. The 'National Government' of the time was a coalition government, and it has been suggested that the Prime Minister's decision to leave matters in the hands of the Cabinet was driven by a fear that the compromise between the parties might otherwise break down. Markesinis op cit 78-79. Actual political realities are vital for a proper understanding of the workings of a Constitution. Op cit 114-115.
234. Imperial Conferences were not designed to deal with such issues. Their primary aim was to promote Imperial co-operation. Accordingly, participants were drawn exclusively from the ranks of existing governments. VerLoren Van Themaat 2ed op cit 191-192; & 192 n52. Consequently, the participants did not encompass the broad spectrum of political opinion which was to be found in each of the respective member states. Discussing practices which were so closely tied up with domestic political conditions in each of the participating states, would therefore have been utterly inappropriate.
235. Kennedy & Schlosberg op cit 143.
236. Krüger A Nation op cit 195; and Prime Minister Hertzog House of Assembly Debates 35 (1939) 4th September Cols 19 & 20.
237. Krüger A Nation op cit 185. In 1933, the South African Party entered a coalition with the ruling National Party. General Hertzog was Prime Minister, with General Smuts as deputy-Prime Minister in the new arrangement. Op cit 165-167. A movement towards fusion of the two coalition parties commenced almost immediately, and this was finally achieved in June 1934. Op cit 168-173. The coalition parties gained an overwhelming victory in the 1933 elections. Op cit 166. Under the colours of the 'United South African National Party' the fused coalition partners went on to win the subsequent elections in May 1938. Op cit 185.
238. Op cit 194-195; and Keith 'The War and the Constitution' (1940) 4 MLR 2.
239. Krüger A Nation op cit 195-196.
240. Ibid. The session had been called so that the life of the Senate could be extended. Ibid.
241. Ibid.
242. Op cit 196.

243. Ibid.
244. Ibid.
245. Ibid.
246. Ibid; and Prime Minister Hertzog Debates 35 (1939)op cit Col 18.
247. Krüger A Nation op cit 196; Keith (1940) 4 MLR op cit 2; and Prime Minister Hertzog Debates 35 (1939) op cit Cols 18 & 20.
248. Keith (1940) 4 MLR op cit 2; De Smith Constitutional and Administrative Law op cit 126 & n23; and Markesinis op cit 83 n3.
249. Krüger A Nation op cit 196.
250. Keith (1940) 4 MLR op cit 2; Krüger A Nation op cit 196; and Prime Minister Hertzog Debates 35 (1939) op cit Col 18.
251. Keith (1940) 4 MLR op cit 2-3; and Krüger A Nation op cit 196-197. The Prime Minister's views are set out in Debates 35 (1939) op cit Cols 18-24. The views of General Smuts, who was Minister of Justice at the time [Parliamentary Register 1910-1982 op cit 49] are set out in Debates 35 (1939) op cit Cols 24-31.
252. Krüger A Nation op cit 198.
253. Ibid; and Keith (1940) 4 MLR op cit 2-3. The 'United Party' had split into two factions. Prime Minister Hertzog and his supporters enjoyed the support of the Purified National Party under Dr Malan. General Smuts and his supporters enjoyed the support of the Dominion Party, the Labour Party, and the members representing Black voters in the Cape. Krüger A Nation op cit 196; 197; & 198.
254. Krüger A Nation op cit 198. The Prime Minister had warned the House of Assembly that he would treat the vote as a matter of confidence in his leadership. Debates 35 (1939) op cit Col 23.
255. Krüger A Nation op cit 198.
256. Quoted in Van Den Heever op cit 282-283.
257. Op cit 283; and Krüger A Nation op cit 198.
258. Van Den Heever op cit 283; and Krüger A Nation op cit 198.
259. Van Den Heever op cit 283.
260. Ibid, quoting comments from the 'Round Table'.
261. Van Den Heever op cit 283; and Krüger A Nation op cit 200.
262. VerLoren Van Themaat 2ed op cit 158. The 'Mandate' issue is discussed further. Ch 3 op cit 76-79 infra.
263. Keith (1940) 4 MLR op cit 6.
264. Markesinis op cit 82.
265. Op cit 83.
266. De Smith Constitutional and Administrative Law op cit 126 & 174.
267. Op cit 127. Jennings would go even further, and argues that it would be unconstitutional (ie a breach of convention) for the Queen to grant a dissolution in the following circumstances:
'The Queen must not intervene in party politics. She must not, therefore, support a Prime Minister against his colleagues. Accordingly, it would be unconstitutional for the Queen to agree with the Prime Minister for the dissolution of the government in order to allow the Prime Minister to override his colleagues.'
Jennings Cabinet Government op cit 86.

268. Markesinis op cit 83-84.
269. Op cit 83 nn2 & 3.
270. Ibid.
271. De Smith Constitutional and Administrative Law op cit 126-127.
272. Sir Patrick Duncan was the Governor-General of the Union at the relevant time. VerLoren Van Themaat 2ed op cit 158.
273. Ch 3 op cit 53-60 supra.
274. In the United Kingdom, Gladstone's Liberal Government of 1892-1894 was able to use the support of the Irish Nationalists to sustain a parliamentary majority. Jennings Cabinet Government op cit 521. In January 1894, the Prime Minister clashed with his Cabinet colleagues over the naval estimates. They had all flatly rejected his proposals. MacIntosh The British Cabinet op cit 236; 307; 320; & 326. Gladstone had always enjoyed elections, and he proposed one to the Cabinet in February 1894 to end his 'political difficulties', but they rejeced the idea. Op cit 307. Gladstone believed that he was on the verge of being ejected by his colleagues. Op cit 236. Unable to pursue his notion of an election, he resigned on 3rd March 1894. Op cit 236; 320; & 326.
The parallels with General Hertzog in 1939 are not that close. Gladstone had been 'repudiated' by the Cabinet, but not by the House of Commons as well. It is interesting to note however, that Gladstone did not attempt to advise a dissolution when he was so clearly lacking the support of his colleagues. His decision to bow to the wishes of the Cabinet was in accordance with British conventional tradition up until 1918. Whether a similar confrontation between a Prime Minister and his Cabinet would have ended in a similar way after 1918, is open to speculation. See further, n267 supra.
275. Ch 3 op cit 54 & n167 supra.
276. According to the orthodox view in the United Kingdom, the King cannot refuse a dissolution to Ministers who are assured of Parliament's support, because no viable, alternative Ministry is possible. A refusal of advice would only be feasible when two criteria were equally satisfied. Firstly, an alternative Ministry would have to be available, which would be willing to accept responsibility for the King's action. Secondly, any alternative Ministry would have to be able and willing to govern in conjunction with the existing lower House. Fulfilment of both these conditions would mean that elections could be avoided. It would only be in rare circumstances indeed, that one 'majority' government could be replaced by another 'majority' government without elections. Markesinis op cit 84-86.
The King could refuse a dissolution to a 'minority' government, but only if the opposition groupings in the lower House were able and willing to construct an alternative administration which enjoyed majority support in that House. Much would also depend however, on the particular political circumstances in each case. Op cit 86-92.
277. 'In the circumstances, I cannot see on what grounds I should

be justified in rejecting the decision of the House and holding a general election if General Smuts, whose policy obtained the support of the House, is in a position to form a government which will have the support of the House.'
Ch 3 op cit 70-71 supra.

278. Krüger A Nation op cit 201; 204; 205-208; 211-213; 215-216; and Van Den Heever op cit 283 & 294-296.
279. Ch 3 op cit 57 & nn186 & 187 supra.
280. Ibid.
281. Jennings Cabinet Government op cit 399-400; & 409.
282. Ibid. Opponents of the Liberal government's Irish Home Rule Bill frequently raised the spectre of looming civil war. Among such people were Sir William Anson and A.V. Dicey. Their letters to 'The Times' are quoted in Jennings Cabinet Government op cit 541; & 544-545 respectively.
283. Of course, the split in the Cabinet and the repudiation of the Hertzog faction by Parliament gave the Governor-General far more room to act independently of advice. Furthermore, a Governor-General may withstand accusations of political partisanship to a much greater extent than an hereditary Monarch.
284. VerLoren Van Themaat 2ed op cit 158.
285. Ch 3 op cit 70-71 supra.
The mandate theory has been described by Jennings as follows:
'A Government exists only because it has secured a majority at an election, or is likely to secure such a majority when an election takes place; but it secures that majority by appealing to the electorate to support a policy. The electorate expects that that policy will be carried to fruition. It does not expect that radical changes will be made unless they were part of the party policy or are the necessary consequences of that policy.'
Jennings Cabinet Government op cit 504. Hence, there are certain limits which Parliament and the Cabinet would be expected to observe. VerLoren Van Themaat 2ed op cit 160 describes these limitations upon government in the following way:
'Daar behoort geen fundamentele wysigings in die bestaande beleid op wetgewende of uitvoerende gebied te wees nie, tensy die moontlikheid van so 'n wysiging by die vorige algemene verkiesing voor die kiesers gelê is.'
286. Ch 3 op cit 70-71 supra.
287. Krüger The Age of the Generals 188; and VerLoren Van Themaat 2ed op cit 160.
288. Ch 3 op cit 70-71 supra.
289. Ch 3 op cit 69 & nn236-239; n241; & nn243-244 supra. The government decided to adopt a policy of neutrality with specific reference to the Czech crisis, but even this decision was taken several months after the elections in 1938. The government's attitude towards war would depend on whether or not it perceived the interests of the Union to be at stake. Ibid.
290. First of all, VerLoren Van Themaat argues that there was no mandate to proceed with the war. Accordingly, he attacks

the behaviour of the Governor-General as follows:
'Of die goewerneur-generaal hier 'n konvensie verbreek het, is nie volkome duidelik nie, maar daar is iets vir die opvatting te sê dat dit wel die geval was, te meer aangesien die vraag van deelname aan die oorlog al dan nie, nie voor die kiesers tydens die verkiesing van Mei 1938 gelê is nie, en die kiesers dus geen mandaat in hierdie verband gegee het nie.'
VerLoren Van Themaat 2ed op cit 158. Later he qualifies the attack when he notes:
'In 1939 egter, het die volksraadlede geen spesifieke mandaat gehad in verband met die standpunt wat hulle oor oorlogverklaring van die Unie moes inneem, behalwe dan dat genl. Hertzog voor 1939 herhaaldelik verklaar het dat die parlement sal besluit of die Unie oorloog sal verklaar indien Engeland dit doen.'
Op cit 160.

291. A more precise mandate from the electorate might have been required, if the new Smuts administration had proposed to send conscripts overseas to fight the war in Europe. Keith (1940) 4 MLR op cit 6. There had never been any suggestion however, that conscripts would be sent overseas to fight. Ibid; Krüger A Nation op cit 197; 201-202; and the Minister of Justice Debates 35 (1939) op cit cols 25 & 31.
292. In the United Kingdom, Chamberlain had been forced to concede that friendly relations with Germany were becoming impossible. In South Africa, the surrender of South-West Africa to a new German administration was becoming an ever increasing possibility. Minister of Justice Debates 35 (1939) op cit cols 27-28.
293. VerLoren Van Themaat's reference to the mandate theory includes an acknowledgment of Le May's contribution to the subject. He fails however, to answer any of the criticisms of the mandate theory which Le May has offered. VerLoren Van Themaat Staatsreg 3ed 184-185 & n16; and Le May 'Parliament, The Constitution and the Doctrine of the Mandate' (1957) 74 SALJ 33 at 40-42. See also, n295 infra.
294. Le May (1957) 74 SALJ op cit 40.
295. Although Jennings regards the mandate theory as important in the United Kingdom, he recognises that it is necessarily vague, and that its operation is a matter of dispute. Jennings Cabinet Government op cit 504-505. He has also recognised a desire by government to win vague or ambiguous election mandates. In the 1935 elections for example, the government had to come to terms with the pacifist sentiments of the electorate, even though it did not share those feelings. Accordingly, the need for military rearmament was not stressed by the government. A mandate was requested for 'the establishment of a settled peace', while support for the League of Nations was also emphasised. The need for rearmament was mentioned in the Conservative party manifesto, but it was not given the emphasis which it was clearly receiving in the Cabinet. Jennings has noted that although the election was not specifically fought on the issue of rearmament, the return of the government was taken

to have given the Baldwin administration a 'mandate' for a large rearmament programme. Op cit 506-509. MacIntosh has attributed less importance to the mandate theory. He has argued that even in the 1970s, British governments were elected to run the country as they saw fit, to be judged at a later stage by the electorate on the merits of their total performance. MacIntosh The British Cabinet op cit 16. VerLoren Van Themaat asserts that the mandate theory is a convention which has been accepted in South Africa. VerLoren Van Themaat 2ed op cit 160. Although he has condemned the supposed breach of mandate in 1939, he offers no analysis of the actual workings of the theory at that time. No indication is given of the real strength or effectiveness of the 'convention' in the Union. No evidence is offered to show that a more strict interpretation of the mandate was required in South Africa than has been the case with respect to the United Kingdom.

296. Jennings Cabinet Government op cit 504.
297. Op cit 506-509.
298. This can be inferred from the first paragraph of the letter to General Hertzog. Ch 3 op cit 70-71 supra.
299. Ch 3 op cit 59-60 supra.
300. N267 supra.
301. Herbert Asquith believed that the involvement of the Sovereign in politics would be a catastrophe which all statesmen would attempt to avoid. Jennings Cabinet Government op cit 408. In 1894 Gladstone resigned. He did not attempt to pursue his desire for a dissolution any further. N274 supra.
302. Hertzog's main concern was to put his case for neutrality before the electorate. This was more important than involving the Governor-General in politics.
It may be possible to argue that Hertzog broke a convention by involving the Governor-General in politics. Consequently, it can be argued that the Governor-General was released from a concomitant convention which required him to accede to the Prime Minister's request. Further research is needed however, to establish whether or not these conventions existed in the Union.
303. Ch 3 op cit 32-52 supra.
304. Jennings The Law and the Constitution 92.
305. VerLoren Van Themaat 2ed op cit 237-240. The judicial authority of the Union was also subordinate to the judicial authority of the United Kingdom, because the Judicial Committee of the Privy Council acted as the highest court of appeal from South Africa. Op cit 240. It is beyond the scope of this thesis to explore the nature of the judiciary under the South African legal system.
The subordination of the legislative and executive authority of the Union to the Imperial authorities in London has already been examined in Ch 2 op cit 17-29 supra.
306. Ch 2 op cit 17-19 supra.
307. Op cit 24-29 supra.
308. Op cit 21-23 supra.
309. Op cit 20-21 supra.

310. Op cit 23-24 supra.
311. Krüger A Nation op cit 146.
312. Ibid.
313. Keith The Dominions op cit 58-60; 62-63; VerLoren Van Themaat 2ed op cit 199.
314. N313 supra; and Krüger A Nation op cit 146.
315. The problems were particularly acute in relation to the operation of Dominion legislation. There were four key difficulties:
    1. The principles embodied in or underlying the Colonial Laws Validity Act 1865.
    2. The legal incapacity of Dominion Parliaments to legislate with extra-territorial effect.
    3. The existing statutory provisions which required reservation of Bills.
    4. The existing statutory provisions which authorised the Disallowance of Acts.

    The Conference decided to refer these difficulties to a Committee of Experts. VerLoren Van Themaat 2ed op cit 204; and The Report of the Inter-Imperial Relations Committee of 1926 paragraph 3(c). The paragraph is quoted in VerLoren Van Themaat 2ed op cit 565-566.
316. N315 supra.
317. This was clearly acknowledged by The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929. The report is reproduced in VerLoren Van Themaat 2ed op cit 567-570. The Report acknowledged that two problems associated with colonial subordination could not be dealt with by convention:
    1. The territorial limitation upon the operation of Dominion legislation: as far as this limitation was concerned, the report noted that the law was full of conflict and obscurity. The Report argued that uncertainty as to the existence and extent of territorial limitations rendered it desirable for legislation to be passed by the Parliament of the United Kingdom. The new legislation would make it clear that the limitation no longer existed. Thereafter, Dominion Parliaments would not have to employ indirect methods to get round such territorial restrictions. Paragraphs 38 and 29 of the Report, quoted in VerLoren Van Themaat 2ed op cit 568. See also, op cit 206-207.
    2. The law of 'repugnancy' contained in s 2 of the Colonial Laws Validity Act 1865: as far as 'repugnancy' was concerned, the report implied that it was inconsistent with the principles of equality which were espoused at the 1926 Conference. Accordingly, the Report recommended that legislation be enacted declaring that the 1865 Act should no longer apply to the laws passed by any Dominion. The Report also argued in favour of a substantive enactment, which would declare the powers of the Parliament of a Dominion. It was felt that such an enactment would be necessary, because a simple repeal of the Colonial Laws

Validity Act could lead to the restoration of the old common law doctrine of 'repugnancy'. Paragraphs 50 and 51 of the Report, quoted in VerLoren Van Themaat 2ed op cit 569. See also op cit 207-208.
The adoption of constitutional convention could not end the Imperial Parliament's inherent legal right to legislate for the Dominions. The report anticipated however, that the Imperial Parliament could adopt a convention of self-restraint. See paragraph 54 of the Report, quoted in VerLoren Van Themaat 2ed op cit 569. See also op cit 208-209 & nn37-39.

318. VerLoren Van Themaat 2ed op cit 161 & n58; and Kahn (1961) Annual Survey of South African Law 1.
319. Ch 2 op cit 17-19 supra.
320. VerLoren Van Themaat 2ed op cit 201 says:
'In verskeie opsigte was die wetgewende gesag in die vrygeweste nog aan die wetgewende sowel as die uitvoerende gesag in Groote [sic] Brittanje ondergeskik; al het die parlement en kabinet van Groot Brittanje waar die vrygewestelike wetgewing gegeld het, al geruime tyd nie meer van hulle bevoegdhede gebruik gemaak nie.'
In 1914, there were suggestions that the Imperial government should instruct the Governor-General to reserve the Indemnity Bill. These suggestions were resisted by the British government however, on the grounds that reservation would prejudice 'responsible' government in the Union. Evatt The King and His Dominion Governors 175-176; and Wheare The Statute of Westminster op cit 68-70.
321. The Governor-General was under a statutory obligation to reserve certain classes of legislation under the Colonial Courts of Admiralty Act 1890 53 & 54 Vict, C 27; the Merchant Shipping Act 1894 57 & 58 Vict, C 60; and the South Africa Act 1909. Ch 2 op cit 18 & nn44 & 45 supra. Several Bills were actually reserved by the Governor-General in accordance with the terms of the South Africa Act 1909. Kennedy & Schlosberg op cit 96-97. For 'reservation' under the Royal Instructions, see Ch 2 op cit n43 supra.
322. VerLoren Van Themaat 2ed op cit 238.
323. Paragraph 3 of the 1926 report said:
'Existing administrative, legislative and judicial forms are admittedly not wholly in accord with the position as described ... This is inevitable, since most of these forms date back to a time well antecedent to the present stage of constitutional development.'
VerLoren Van Themaat 2ed op cit 201; & 564-565.
324. Paragraph 3(c) of the Report, quoted in VerLoren Van Themaat 2ed op cit 565.
325. Op cit 566.
326. Disallowance of Legislation is examined at Ch 3 op cit 89-90 infra.
327. Keith The Dominions op cit 66.
328. Ibid.
329. Paragraph 3(c) of the 1926 Report. VerLoren Van Themaat 2ed op cit 565-566.
330. Ibid. The Committee was also expected to look at other

complex problems associated with external, Imperial control. N315 supra.

331. VerLoren Van Themaat 2ed op cit 204. The committee has been elevated to the status of a conference. Ibid.
332. The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929 paragraph 32. See VerLoren Van Themaat 2ed op cit 206; & 567-568.
333. Ch 3 op cit 45-46 supra. The Governor-General of course, may have enjoyed a 'reserve power' to reserve Bills without advice. Keith The Dominions op cit 67 asserted that the Governor-General could reserve Bills only on Ministerial advice 'or on some other constitutional ground.' He fails to explain what he means by this however.
334. 1929 Report op cit paragraph 32. VerLoren Van Themaat 2ed op cit 206; & 567-568.
335. Keith The Dominions op cit 66-67.
336. 1929 Report op cit paragraph 32. VerLoren Van Themaat 2ed op cit 206; & 567-568.
337. Paragraph 33. See VerLoren Van Themaat 2ed op cit 206; & 568.
338. Paragraphs 33 & 34. See VerLoren Van Themaat 2ed op cit 206 & 568.
339. Dominion constitutional change was also restricted by the Colonial Laws Validity Act 1865 28 & 29 Victo, C 63. The Imperial Conferences of 1926 and 1930 sought to lift this outstanding restriction as well. Ch 3 op cit 100-105 infra.
340. VerLoren Van Themaat 2ed op cit 213; and Keith The Dominions op cit 67.
341. Keith The Dominions op cit 67.
342. Ibid; and VerLoren Van Themaat 2ed op cit 206.
343. N342 supra. The grant of the royal assent by the Sovereign is described by Erskine May Treatise on the Law, Privileges, Proceedings and Usage of Parliament 597-600.
344. 1929 Report op cit paragraphs 35 & 36. VerLoren Van Themaat 2ed op cit 568.
345. Status of the Union Act No 69 of 1934 ss 8; 9; & 11(1). Reservation survived thereafter, only under s 106 of the South Africa Act 1909 and under the Schedule thereto. Wheare The Statute of Westminster op cit 249.
346. Reservation was required under paragraph VII of the Royal Instructions of 1909. Ch 2 op cit n43 supra. The paragraph became an anachronism after the 1930 Imperial Conference, when it was accepted that the King would issue no further Instructions to his Governors-General on the advice of Ministers in the United Kingdom. The paragraph was even more obviously outdated after the enactment of the Status of the Union Act 1934, because the 1934 Act deleted all reference to reservation in the South Africa Act 1909 - except for one surviving instance in s 106, and another in paragraph 25 of the Schedule. N345 supra.
347. May op cit 169; 544-546; and Wheare The Statute of Westminster op cit 254.
348. Keith The Dominions op cit 67; 79; 81; and the Statute of Westminster 22 Geo V C 4 ss 5 & 6.

349. The Status of the Union Act No 69 of 1934 declared:
'The parts of the Statute of Westminster, 1931 (22 Geo V C 4) and the Afrikaans version thereof, set forth in the Schedule to this Act, shall be deemed to be an Act of the Parliament of the Union and shall be construed accordingly.'
The Statute of Westminster thus became an integral part of South African law. Kennedy & Schlosberg op cit 101; May op cit 42; and VerLoren Van Themaat 2ed op cit 218.
350. Reservation under s 106 of the South Africa Act 1909 was finally abolished by the Privy Council Appeals Act No 16 of 1950. VerLoren Van Themaat 2ed op cit 241; 243 & n51. Reservation under paragraph 25 of the Schedule to the South Africa Act 1909 has not been formally abolished.
351. Keith The Dominions op cit 69. The power of disallowance was described in Ch 2 op cit 19 & nn47-50 supra.
352. N351 supra.
353. VerLoren Van Themaat 2ed op cit 203; Wheare The Statute of Westminster op cit 72-74; and Ch 2 op cit n49 supra. From 1898 onwards, there was a convention that disallowance would be exercised only in relation to legislation which affected Imperial affairs.
354. VerLoren Van Themaat 2ed op cit 203 & n13.
355. Op cit 203; & 565-566. Refer also to Ch 3 op cit 85 & nn325-326 supra.
356. VerLoren Van Themaat 2ed op cit 204; & 566.
357. Op cit 205; & 567. Accordingly, paragraph 23 went on to say:
'... those Dominions who possess the power to amend their Constitutions in this respect can, by following the prescribed procedure, abolish the legal power of disallowance if they so desire.'
South Africa fell into this category. VerLoren Van Themaat 2ed op cit 205 & n22.
358. VerLoren Van Themaat 2ed op cit 211 & 213.
359. Legal form however, remained unaffected by the decisions of the 1926, 1929, and 1930 Conferences.
360. Status of the Union Act No 69 of 1934 s 11(2) said:
'Section sixty-five [of the South Africa Act 1909] shall be repealed as from a date to be fixed by the Governor-General by proclamation in the Gazette.'
S 65 of the South Africa Act 1909 was the provision which regulated the exercise of disallowance. Ch 2 op cit 19 supra. The enactment of s 11(2) of the 1934 Act had to be delayed, because immediate and total abolition of disallowance would have prejudiced South African stocks under the Colonial Stock Act 1900 63 & 64 Vict, C 62. Accordingly, the enactment of s 11(2) of the 1934 Act was delayed until new arrangements could be made for South African stocks under the Colonial Stock Act 1934 24 & 25 Geo V C 47. Wheare The Statute of Westminster op cit 248-249; and Keith The Dominions op cit 69-71.
361. Ch 2 op cit 29 supra.
362. After the adoption of paragraph 3(c) of the 1926 Imperial Conference Report. See Ch 3 op cit 85 & 89-90 supra.
363. VerLoren Van Themaat 2ed op cit 202-203; 206; & 238-239.

364. Ibid.
365. Op cit 238.
366. Op cit 238-239; and Ch 2 op cit n47 supra.
367. The Governor-General of the Union could exercise a few prerogative powers. Ch 2 op cit 24-29 supra.
368. Ibid.
369. VerLoren Van Themaat 2ed op cit 238.
370. Ibid; and Ch 2 op cit 28-29 supra.
371. VerLoren Van Themaat 2ed op cit 242.
372. Ibid; and Coertze 'Die Posisie Van Die Koning As Hoof Van Die Uitvoerende Gesag Van Die Unie Van Suid-Afrika' (1939) 3 THR-HR 252-253.
373. Coertze (1939) 3 THR-HR op cit 252; and Ch 2 op cit 28 supra.
374. Ch 2 op cit 28 supra. Cf Keith The Dominions op cit 64 which implies that the co-signature of a British Minister might not have been strictly necessary if the King was acting on the advice of a Dominion Minister. In 1931 moreover, when the Earl of Clarendon was appointed the Governor-General of South Africa, the Commission was counter-signed by the Prime Minister of the Union. The countersignature of a British Minister was conspicuous by its absence. Kennedy & Schlosberg op cit 119-120.
375. Most specifically in relation to the reservation of South African Bills; the disallowance of South African Acts; and vis-a vis the exercise of the King's 'reserved' prerogative powers for the Union.
376. Royal Executive Functions and Seals Act No 70 of 1934. The importance of the Status of the Union Act No 69 of 1934 is discussed separately for purposes of clarity. Ch 3 op cit 99-100; & 103-104 infra.
377. Ch 3 op cit 88-90 supra.
378. Royal Executive Functions and Seals Act No 70 of 1934 s 1(1) established:
'There shall be a Royal Great Seal of the Union hereinafter referred to as the Great Seal ...'
S 1(2) established:
'There shall be a Royal Signet (hereinafter referred to as the Signet) ...'
379. Op cit s 3:
'The Prime Minister of the Union or, in his absence, his deputy shall be the Keeper of the Great Seal and the Signet.'
380. Op cit s 4(1) established:
'The King's will and pleasure as Head of the Executive Government of the Union shall be expressed in writing under his sign manual ...'
S 4(2) provided:
'The King's sign manual shall furthermore be confirmed by the Great Seal on all royal proclamations and he may, by proclamation, prescribe from time to time which other public instruments bearing his sign manual shall pass either the Great Seal of the Signet.'
381. Op cit s 4(2). See n380 supra. Proclamation No 5 of 11th January 1935 prescribed which other public instruments were

to pass the Great Seal or the Signet Seal. The proclamation is reproduced in VerLoren Van Themaat Staatsreg 1ed 531. Refer also to Coertze (1939) 3 THR-HR op cit 254.

382. The Royal Executive Functions and Seals Act No 70 of 1934 s 4(1) established:
'The King's will and pleasure as Head of the Executive Government of the Union shall be expressed in writing under his sign manual, and every such instrument shall be countersigned by one of the King's Ministers for the Union.'
S 4(3) provided:
'The Keeper of the Seals shall affix either the Great Seal or the Signet, as the case may be, to any instrument bearing the King's sign manual and the countersignature of one of His Majesty's Ministers of State for the Union and required to pass either the Great Seal or the Signet.'
383. Coertze (1939) 3 THR-HR op cit 253; & 254-255.
384. That is, in respect of the 'reserved' prerogative powers.
385. Royal Executive Functions and Seals Act No 70 of 1934 s 6(1):
'Whenever for any reason the King's signature to any instrument requiring the King's sign manual cannot be obtained or whenever the delay involved in obtaining the King's signature to any such instrument in the ordinary course would, in the opinion of the Governor-General-in-Council, either frustrate the object thereof, or unduly retard the despatch of public business, the Governor-General shall, subject to such instructions as may, from time to time, in that behalf, be given by the King on the advice of His Ministers of State for the Union, execute and sign such instrument on behalf of His Majesty and an instrument so executed and signed by the Governor-General and countersigned by one of the King's Ministers of the Union shall be of the same force and effect as an instrument signed by the King.'
386. Ibid. Hence, when South Africa declared war on Germany on 6th September 1939, the King's sign manual was not required. Hahlo & Kahn op cit 173. Control of the prerogative was also transferred by the Status of the Union Act No 69 of 1934 s 4(1). This is examined at Ch 3 op cit 99-100 infra.
387. Kahn The New Constitution 8; 23; and Kahn (1961) Annual Survey of South African Law 1.
388. Ch 2 op cit 21-23; and Ch 3 op cit 52-53 supra.
389. Ch 3 op cit 53; & 64-68 supra.
390. Op cit 52-82 supra.
391. VerLoren Van Themaat 1ed op cit 155 n55.
392. Kennedy & Schlosberg op cit 117; or May op cit 167.
393. N392 supra; or VerLoren Van Themaat 2ed op cit 262.
394. In 1882, Natal objected to the appointment of Sir W. Sendal as Governor, an objection which resulted in Sir Henry Bulwer being appointed in the place of the former. In 1889, New South Wales and South Australia supported the claims of Queensland, which demanded the right to express an opinion before any of its Governors were formally appointed. Kennedy & Schlosberg op cit 117; or May op cit 167.
395. Kennedy & Schlosberg op cit 117-118; May op cit 167; or

VerLoren Van Themaat 2ed op cit 262.

396. N395 supra.

397. Ch 3 op cit 85 & 89-90 supra.

398. VerLoren Van Themaat 2ed op cit 262; and Coertze (1939) 3 THR-HR op cit 255-256.

399. VerLoren Van Themaat 2ed op cit 262. The Report of the Imperial Conference, 1930 (Cmd 3717) at 26-27 declared: 'Having considered the question of the procedure to be observed in the appointment of a Governor-General of a Dominion in the light of the alteration in his position resulting from the Resolutions of the Imperial Conference of 1926, the Conference came to the conclusion that the following statements in regard thereto would seem to flow naturally from the new position of the Governor-General as representative of His Majesty only:
    1. The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned.
    2. The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance.
    3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.
    4. The Ministers concerned tender their formal advice after informal consultation with His Majesty.
    5. The channel of communication between His Majesty and the Government of any Dominion is a matter soley concerning His Majesty and such Government ...
    6. The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by His Ministers in the Dominion concerned.'

400. The Earl of Clarendon's Commission was issued on 3rd December 1930. Kennedy & Schlosberg op cit 119-120. He formally assumed office however, on 26th January 1931. Parliamentary Register (1910-1961) op cit 1-2. The previous Governor-General, the Earl of Athlone, was appointed on 21st January 1924, more than two years before the 1926 Conference. Ibid.

401. Kennedy & Schlosberg op cit 119.

402. Ibid. It is interesting to note that a South African Minister countersigned the Commission rather than a British Minister, because the Royal Executive Functions and Seals Act 1934 was not enacted for a further three years. Hertzog's countersignature was in conflict with the procedure which Coertze has described. Ch 2 op cit 28-29 supra. Keith has argued however, that Dominion Ministers could accept responsibility for the actions of the King. Keith The Dominions op cit 64. Accordingly, the countersignature of a Dominion Minister would be as legally valid as the countersignature of a British Minister. The appointment of the Earl of Clarendon, nevertheless, could

not have taken place without a certain amount of co-operation from the British government. Prior to 1934, public seals were still in the possession of Ministers of the Crown in the United Kingdom. Ch 2 op cit 28-29 supra. Among these could be included the Royal Signet Seal. Keith The Dominions op cit 64. The Commission which was issued to the Governor-General passed under this Royal Signet Seal. Kennedy & Schlosberg op cit 119-120. Accordingly, a modicum of British Ministerial goodwill was required before the Commission could be issued to the new Governor-General. After 1934 of course, British control of the seals was brought to an end. A Royal Signet Seal of the Union was created under the Royal Executive Functions and Seals Act No 70 of 1934. Ch 3 op cit 92-94 supra. Furthermore, Proclamation No 5 of 11th January 1935 determined that Commissions issued to Governors-General would pass under the newly created Signet Seal of the Union. May op cit 549-550.

403. May op cit 169. A change in the use of seals, nonetheless, was implemented in 1934-1935. N402 supra.
404. May op cit 170.
405. Op cit 170-171; and Parliamentary Register (1910-1961) op cit 1-2
406. May op cit 170-171. There appears to have been no convention against the appointment of party politicians as Governors-General of the Union. Op cit 170.
407. Kennedy and Schlosberg op cit 38-39.
408. Op cit 39.
409. Ibid.
410. Ibid.
411. Ibid; and May op cit 168.
412. Kennedy and Schlosberg op cit 39 n1.
413. Op cit 39. cf May op cit 168.
414. Kennedy and Schlosberg op cit 39.
415. VerLoren Van Themaat 2ed op cit 262-263; and Kennedy and Schlosberg op cit 39-40.
416. N415 supra.
417. Ibid.
418. Kennedy and Schlosberg op cit 39-40.
419. The three High Commission Territories were Basutoland, Swaziland and the Bechuanaland Protectorate. Kennedy and Schlosberg op cit 534-542. See further, VerLoren Van Themaat 2ed op cit 263. In 1935, the title of the High Commissioner for South Africa was changed to the High Commissioner for Basutoland, the Protectorate of Bechuanaland and Swaziland. VerLoren Van Themaat 2ed op cit 263 & n54.
420. VerLoren Van Themaat 2ed op cit 263; or Kennedy and Schlosberg op cit 40. Such a role became necessary because the Governor-General of the Union was no longer regarded as an agent or representative of the British government. Ch3 op cit 91-93 & n389 supra.
421. Status of the Union Act No 69 of 1934. See further, Ch 7 op cit 206-207 infra.
422. It is questionable, however, whether the wording of s 4(1) of the Status of the Union Act could be enforced by a court

of law. Ch 7 op cit 209-211 & n173 infra.

423. Ch 7 op cit 211 n176 infra.

424. May op cit 169; and VerLoren Van Themaat 2ed op cit 263.

425. N424 supra. The Sovereign was still entitled to issue instructions to the Governor-General of the Union. Letters Patent of 1937 paragraph I. It must be remembered, however, that s 4(1) & (2) of the Status of the Union Act of 1934 required the King to act on the advice of his Ministers of State for the Union.

426. See further, Ch 2 op cit 21-23; and Ch 7 op cit 211 & nn176-179 infra.

427. Ch 2 op cit 20-21 supra.

428. Ibid.

429. Ibid.

430. The origins of the convention may be traced back to 1839. By 1926 it had developed to such an extent that even legislation governing Imperial affairs required consultation with and the consent of any Dominion to which it was to apply. Wheare The Statute of Westminster op cit 79-83. See also VerLoren Van Themaat 2ed op cit 200-201.

431. Reproduced in VerLoren Van Themaat 2ed op cit 569. See further, op cit 207-210.

432. Copyright Owners Reproduction Society Ltd v EMI (Australia) (Pty) Ltd 100 CLR 597 per Dixon CJ at 609-612. At 612 he said:

> 'It is true that in 1928 the Statute of Westminster had not yet been passed but the convention was strong and unbending which governed the exercise of the legislative power of the Parliament of the United Kingdom to affect the law in operation in a dominion. Every presumption of construction was against such an intention. Further, the concurrence of the dominion was treated as an indispensable condition.'

See also McTiernan J at 612-613; and Taylor J at 615.

433. A constitutional convention cannot amend or repeal an existing rule of law. Ch 6 op cit 161-169 infra. See further, VerLoren Van Themaat 2ed op cit 208 & n38; & 209. At 208 he says:

> 'Die konferensie het dus aanvaar dat die Britse parlement juriedies die bevoegdheid besit, en behou, om wette met betrekking tot die vrygeweste aan te neem'.

434. VerLoren Van Themaat 2ed op cit 209.

435. Op cit 208-209.

436. Op cit 211-212.

437. The Statute of Westminster 1931 22 Geo V C.4. The term 'Dominion' was defined in s 1 as follows:

> 'In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.'

438. Wheare The Commonwealth op cit 27.

439. Wheare The Statute of Westminster op cit 147-148; & 153-157. At 155-156, Wheare asserts that the sovereignty of Parliament is indestructable by Parliament. He argues,

however, that sovereignty rests on acceptance of the doctrine by the courts. Accordingly, he believes that the courts are in a position to qualify or reject the legal sovereignty of the United Kingdom Parliament. He argues that South African courts have actually done this. See further Ch 3 op cit 104 infra. See also, Keith The Dominions op cit 122; and VerLoren Van Themaat 2ed op cit 217-218.

440. Wade and Phillips op cit 61; & 65-68.
441. British Coal Corporation v The King [1935] AC 500.
442. Op cit 520.
443. Wheare The Statute of Westminster op cit 156-157; & 243-245; Wheare The Commonwealth op cit 28-29; and VerLoren van Themaat 2ed op cit 217-218.
444. Ch 3 op cit n349 supra.
445. VerLoren Van Themaat 2ed op cit 218; and Wheare The Commonwealth op cit 30; & 33-34.
446. There are two difficulties with the Status of the Union Act No 69 of 1934. Firstly, s 2 of the Act is inconsistent with the wording of s 4 of the Statute of Westminster, 1931. This gives rise to the question whether or not a Dominion Parliament could amend the Imperial Statute. Keith completely rejected the notion that the Statute of Westminster could be amended by a Dominion Parliament. Keith The Dominions op cit 122. Wheare argues, however, that it was perfectly competent for a Dominion Parliament to amend the Statute. Wheare The Commonwealth op cit 33-34. Furthermore, he believes that s 2 of the Status of the Union Act may be regarded as no more than the repeal in advance of hypothetical future Acts of the British Parliament in so far as they purport to extend to the Union as part of the law of the Union, unless they conform to the requirements of the said s 2. Wheare The Commonwealth op cit 33-34; and Wheare The Statute of Westminster op cit 245-246. The second difficulty with the Status of the Union Act No 69 of 1934 is that it is inherently contradictory. S 3 of the Act converted the Statute of Westminster into a law of the Union Parliament. N444 supra. The wording of s 2 of the 1934 Act conflicted with the words in s 4 of the 1931 Statute which were now incorporated into South African law. Which provisions were to prevail? Hahlo and Kahn op cit 150; and Wheare The Statute of Westminster op cit 246.
447. N439 supra.
448. Ndlwana v Hofmeyr NO 1937 AD 229 per Stratford ACJ at 237. See also, Hahlo and Kahn op cit 150.
449. Harris v Minister of the Interior 1952(2) SA 428 (AD) per Centlivres JA at 467. See further, Hahlo and Kahn op cit 150.
450. Hahlo and Kahn op cit 150.
451. Ch 2 op cit 20-21 supra.
452. Wheare The Statute of Westminster op cit 157-158; and VerLoren Van Themaat 2ed op cit 201; & 207-208.
453. Keith The Dominions op cit 73-74; and the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929 paragraph 46. Reproduced in VerLoren Van Themaat 2ed op cit 568. The

doctrine therefore existed even before the introduction of Imperial legislation to regulate the matter. See also Ch 7 op cit 178 n39 infra.

454. Ch 2 op cit 20-21 supra.

455. Ch 3 op cit 83 & n317 supra. The problem was first raised at the Imperial Conference of 1926. VerLoren Van Themaat 2ed op cit 201.

456. Courts are bound to enforce the law, but not convention. Ch 6 op cit 161-169 infra. Prior to the Statute of Westminster in 1931, South African courts were bound to give effect to s 2 of the Colonial Laws Validity Act of 1865. R v Ndobe 1930 AD 484 per De Villiers CJ at 496-497.

457. Statute of Westminster, 1931 22 Geo V C4 s 2:

(1) 'The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion'.

For a thorough analysis of these provisions, see Wheare The Statute of Westminster op cit 157-163.

458. Ch 2 op cit 23-24 supra.

459. Ch 3 op cit 83 & n315 supra.

460. The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929 paragraph 39. The paragraph is reproduced in VerLoren Van Themaat 2ed op cit 568. See also, VerLoren Van Themaat 2ed op cit 206-207.

461. 1929 Report op cit paragraph 38. The paragraph is reproduced in VerLoren Van Themaat 2ed op cit 568.

462. Ch 6 op cit 161-169 infra.

463. Statute of Westminster, 1931 s 3 declared:

'It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation'.

CHAPTER IV

Footnote Authorities

1. Dicey Introduction to the Study of the law of the Constitution 23-24.
2. Op cit 422.
3. Op cit 422-423.
4. Op cit 423.
5. Op cit 423-425. At 424 he explains:
   > 'The discretionary authority of the Crown originates generally, not in Act of Parliament, but in the prerogative... The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.'

   See also Attorney-General v De Keysers Royal Hotel Ltd [1920] AC 508 per Lord Dunedin at 526.
6. Dicey op cit 426.
7. Op cit 426-427.
8. Op cit 427.
9. For an over-view of the Prerogative powers of the Crown, see Wade and Phillips Constitutional and Administrative Law 223-229; & 231-239.
10. Dicey op cit 426.
11. Wheare Modern Constitutions 1.
12. Op cit 2. See further, Jennings The Law and the Constitution 36:
    > 'The selection is made according to the importance of the institutions and rules as they appear to the framers'.
13. Wheare Constitutions op cit 3.
14. Wade and Phillips op cit 2.
15. Jennings Constitution op cit.
16. Op cit 87-98.
17. Op cit 87-89.
18. Op cit 87.
19. Ibid.
20. Jennings' Constitution op cit 87-89.
21. Ibid. See further, Wade in Dicey op cit 423 n1.
22. N23 infra.
23. Jennings Constitution op cit 88-89.
24. Munro 'Laws and Conventions Distinguished' (1975) 91 LQR 219.
25. Wade in Dicey op cit clvi-clvii.
26. Jennings Constitution op cit 92-101.
27. Op cit 92-93; & 96.
28. Ch 3 op cit 82-106 supra.
29. Jennings Constitution op cit 96-101.
30. Dicey op cit 427-428. At 429 he noted, however:
    > 'Since, however, by far the most numerous and important of our constituional understandings refer at bottom to the exercise of the prerogative, it will conduce to brevity and to clearness if we treat the conventions of

the constitution, as rules or customs determining the mode in which the discretionary power of the executive, or in technical language the prerogative, ought (i.e. is expected by the nation) to be employed'.

31. Op cit 427-428.
32. Jennings Constitution op cit 90; and Wade in Dicey op cit 427 nn2 & 3. For background to the Parliament Acts of 1911 and 1949, see Wade and Phillips op cit 181-184.
33. Jennings Constitution op cit 90-92.
34. Op cit 90-91.
35. Op cit 91-92; & 115-116.
36. Op cit 92 & 116.
37. Op cit 91-92.
38. Dicey's final revision of his classic text 'An Introduction to the Study of the Law of the Constitution' was completed in 1914. Dicey op cit IX-X. He died in 1922. Walker The Oxford Companion to Law 355-356. Accordingly, he had little opportunity to detect the development of Commonwealth conventions, many of which became significant only in 1926 or even later. Chapter 3 op cit 82-106 supra.
39. Munro (1975) 91 LQR op cit 219.
40. Marshall Constitutional Conventions : The Rules and Forms of Political Accountability 4.
41. Ibid.
42. Ibid.
43. Op cit 3-5.
44. Ch 5 op cit 120-122 infra.
45. Ch 3 op cit 32-82 supra.
46. VerLoren Van Themaat Staatsreg 3ed 68. See further, Ch 1 op cit 10 & n54 supra.
47. VerLoren Van Themaat regards constitutional convention as a form of law. He describes it in terms of 'gewoontereg'. See Ch 6 op cit n178 infra.
48. Ch 1 op cit 10-11 supra.
49. Ch 7 op cit 213-225 infra.

CHAPTER V

FOOTNOTE AUTHORITIES

1. Ch 4 op cit 107-108 supra.
2. Ibid.
3. Ibid.
4. Hart The Concept of Law 10.
5. Ibid.
6. Ibid.
7. Op cit 54.
8. Op cit 10.
9. Op cit 54.
10. Op cit 9-12; & 54-57. The term 'B' is being used here by the writer for reasons of clarity.
11. Op cit 9 and 54.
12. Op cit 10 and 54. Habits, usages and practices in other words, do not possess a normative character.
13. Ch 4 op cit 107-108 supra.
14. They are obligatory in the sense that a sanction will be imposed if they are not obeyed. The writer acknowledges, nevertheless, that this is an over-simplification of the reasons for obedience to 'rules'. De Smith Constitutional and Administrative Law 49-50. A body of opinion exists which disputes whether legal rules can be binding at all. Hart op cit 10-12. The adoption of this point of view would suggest that non-legal rules (ie conventions) are also incapable of binding force. Another distinction can still be drawn, however, between 'rules' on the one hand and 'habits' on the other. The former are normative, whereas the latter are not. N15 infra; and Hart op cit 55-56; & 83-88.
15. Jennings The Law and the Constitution has adopted a different approach. He has distinguished a convention from a mere 'practice' by ascribing a normative character to the former. At 135 he says:
'... if the authority itself and those connected with it believe that they ought to do so, [ie 'ought' to behave in a certain way] then the convention does exist.'
This distinction has been echoed by the Supreme Court of Canada. Reference re Amendment of the Constitution of Canada (No's 1, 2 and 3) 125 DLR (3d) 1 at 90.
16. Dicey An Introduction to the Study of the Law of the Constitution 439-440; Wheare Modern Constitutions 121; Jennings Constitution op cit 127-131; & 132-134; Jennings Cabinet Government 3-4; MacIntosh The British Cabinet 12-13; Hood Phillips Constitutional and Administrative Law 105; & 110-111; Marshall Constitutional Conventions: the rules and forms of political accountability 6-7; and Munro 'Laws and Conventions Distinguished' (1975) 91 LQR 221.
17. Hood Phillips op cit 105:
'If the persons concerned are not aware that they are under an obligation to act in a certain way, there is no convention ... The precise content of some conventions is uncertain, since they must be flexible enough to meet

changing circumstances; and as that which is not certain cannot be obligatory, it is sometimes difficult to distinguish between obligatory rules and non-obligatory practice ...'
Vague conventions are looked at in somewhat greater detail. Ch 5 op cit 120-122 infra. It should be remembered that even legal rules have a penumbra of uncertainty. Hart op cit 12-13.

18. Dicey op cit 440-441.
19. Op cit 441. Alternatively, it may be argued that the convention has changed, or that new circumstances render the application of an old conventional rule somewhat inappropriate. This is examined further. Ch 5 op cit 122-126 infra.
20. Dicey op cit 441-442; & 454-456.
21. Op cit 441.
22. Op cit 456:
'... the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance, and ultimately to the will of the nation as expressed through Parliament. The conventional code of political morality is ... merely a body of maxims meant to secure respect for this principle.'
23. Op cit 441-442.
24. Op cit 26 & n4; 445-446 & 456.
25. Op cit 446-449; & 456. Note, since 1955 annual legislation for the continued maintenance of the Army and the Air Force has been replaced by Orders-in-Council. New, enabling legislation is required only once in every five years. Op cit 295 n1; and n30 infra.
26. Dicey op cit 315 & n1; 317-318; & 447-449; Wade & Phillips Constitutional and Administrative Law 11; & 186-189. The need for parliamentary authorisation can be traced back to Article 4 of the Bill of Rights 1689 (1 Will and Mary sess 2 C 2), which recited as follows:
'That levying money for or to the use of the Crowne by pretence of prerogative without grant by Parlyament for longer time or in other manner than the same is or shall be granted is illegall.'
Certain taxes are imposed on an annual basis only. These and the rate of Income tax are governed by the annual Finance Act. Appropriation of government revenues is governed by the annual Appropriation Act. Wade & Phillips op cit 188-189; 191; and Dicey op cit 317-318. Loan finance is examined in Chapter 6 op cit 146-147 infra.
27. N25 supra.
28. Dicey op cit 26 n4.
29. N26 supra.
30. Dicey op cit 26 n4; 295 n1; & 446-447. The legal position has changed since Dicey's era. The Army (Annual) Act is no longer required. The British Army is now regulated on the pattern established by the Army Act 1955 3 & 4 Eliz 2 C 18. The Air Force is regulated on the pattern established by the Air Force Act 1955 3 & 4 Eliz 2 C 19. Both Acts were

renewed each year by Order in Council. After both Acts had been in force for five years, however, they automatically expired. See the Army Act 1955 s 226, and the Air Force Act 1955 s 224.
Accordingly, fresh armed forces legislation has been enacted at the end of each quinquennium since 1955. See further, Wade and Bradley's Constitutional and Administrative Law by Bradley (ed) 406-407. Without Parliamentary authorisation, the armed forces of the United Kingdom would lack a proper legal basis. The reason for this can be traced back to the Bill of Rights 1689 (1 Will and Mary sess 2 C 2) Article 6, which reads as follows:
'That the raising or keeping of a standing army within the Kingdome in time of peace unless it be with consent of Parlyament is against the law.'
Note: the armed forces are also dependent on the annual Appropriation Act for their financial resources. Dicey op cit 295 n1.

31. Dicey concedes that no constitution can be absolutely safe from revolution or from a coup d'etat, but he goes on to say:
'... to show that the laws may be defied by violence does not touch or invalidate the statement that the understandings of the constitution are based upon the law.'
Dicey op cit 451.
32. Ch 7 op cit 170-197 infra.
33. Dicey op cit 456.
34. Marshall op cit 4-5; & 211-212.
35. Op cit 4-5.
36. Dicey op cit 456-458. Dicey cites other examples which are of doubtful relevance to late twentieth century political and constitutional conditions.
37. Op cit 456-457.
38. Op cit 457:
'But when you come to inquire what are the signs by which you are to know that the House has withdrawn its confidence from a Ministry, - whether, for example, the defeat of an important Ministerial measure or the smallness of a Ministerial majority is a certain proof that a Ministry ought to retire, - you ask a question which admits of no absolute reply ... Of course ... a Minister or a Ministry must resign if the House passes a vote of want of confidence. There are, however, a hundred signs of Parliamentary disapproval which, according to circumstances, either may or may not be a sufficient notice that a Minister ought to give up office.'
Op cit 457-458.
39. N14 supra; and Marshall op cit 211-212.
40. De Smith The New Commonwealth and its Constitutions 86-87. De Smith felt that this was a particularly acute problem in relation to the rules governing individual and collective Ministerial responsibility. Ibid.
41. Adegbenro v Akintola [1963] AC 614. The crisis of 1962-1963, and the court cases which followed are described in De Smith The New Commonwealth op cit 88-90.

42. N41 supra.
43. The Federal Supreme Court of Nigeria had adopted a wholly different view of the statutory rule from that of the Privy Council. De Smith The New Commonwealth op cit 89; and Akintola v Governor of Western Nigeria and Adegbenro, FSC 187/1962.
44. Adegbenro v Akintola [1963] AC 614 per Viscount Radcliffe at 630.
45. De Smith has commented that the absence of rigid legal rules in Ceylon during the political crisis of 1960, may have helped to save the body politic of that country from major upheaval. De Smith The New Commonwealth op cit 83-85. De Smith Constitutional and Administrative Law op cit 45-46 says:
'... it would be difficult or even harmful to define a number of important conventions. For example, some of the conventions about ministerial responsibility or the working of the Cabinet system are either blurred or experimental. Codification would purchase certainty at the expense of flexibililty; informal modifications to keep the constitution in touch with contemporary political thinking or needs would be inhibited ... In some contexts the rules ought not to be crystal clear. Clarification would tend to stultify one purpose of conventions - keeping the constitution up to date.'
46. De Smith has described conventions as forms of political behaviour regarded as obligatory. De Smith Constitutional and Administrative Law op cit 51. W.H.B. Dean has said that conventional rules are political in character. Dean 'A New Constitution for South Africa?' (1984). Jahrbuch Des Öffentlichen Rechts Der Gegenwart 460 at 474.
47. De Smith The New Commonwealth op cit 79-80; & 83. At 83 he acknowledges that there are great practical difficulties in codifying the conventions on such matters as the dissolution of Parliament and the removal of Ministers. One of the most important qualities of conventional rules is that they permit the workings of the constitution to remain flexible. N45 supra; and Jennings Constitution op cit 81-83. Successful codification would therefore have to retain the quality of flexibility.
Note: under the Republic of South Africa Constitution Act No 110 of 1983 there is a move away from conventional rules to rigid legal rules. The legal constitution may be regarded as a transitional arrangement nevertheless, and its legal rules will be subject to increasing amendment as political conditions change. The constitution will remain, therefore, inherently flexible in character.
48. As Marshall has asked:
'If conventions are rules that politicians are bound to follow, how can they ever be changed?'
Marshall op cit 216.
49. De Smith Constitutional and Administrative Law op cit 53-56; and Marshall op cit 216-217.
50. De Smith Constitutional and Administrative Law op cit 53-54; and Marshall op cit 217.

51. Marshall op cit 217.
52. The conventions which were developed at the various Colonial and Imperial Conferences of the late nineteenth and early twentieth centuries, are perhaps the most obvious example of conventions which have developed and changed through agreement. Jennings Constitution op cit 96-98. A Constitutional Conference which is held prior to the grant of independence to a Colony may also lead to the agreed alteration of convention. De Smith Constitutional and Administrative Law op cit 53-54.
53. Agreement would have to include all those individuals and various political groupings who, within the forseeable future, might be called upon to obey the amended conventional rule. The relative importance of each individual or group might not be easy to anticipate, however. It is interesting to note that the Imperial Conferences never included participants from Parliamentary opposition groups in Britain or the Dominions. cf Sampford and Wood 'Codification of Constitutional Conventions in Australia' (1987) Public Law 231-239.
54. De Smith Constitutional and Administrative Law op cit 54-55; and Marshall op cit 217.
55. Marshall op cit 217.
56. MacIntosh op cit 13 has said in relation to 'precedents': 'As all events in recent political history might be put forward as precedents, the term is reserved for deliberate actions taken in situations which required some judgment as to the wisdom of alternative courses of procedure.' Precedents are often a crucial element in the creation of a convention. Ch 5 op cit 133-136 infra.
57. De Smith Constitutional and Administrative Law op cit 54-55.
58. The United Kingdom Parliament would not legislate for Southern Rhodesia on any matter within the competence of the Southern Rhodesian legislature without the consent of the Southern Rhodesian government. Op cit 54.
59. Ibid.
60. Ibid.
61. Ibid.
62. Madzimbamuto v Lardner-Burke [1969] 1 AC 645 per Lord Reid at 722-723.
63. De Smith Constitutional and Administrative Law op cit 55.
64. Ibid.
65. Ibid.
66. Ibid.
67. Ibid. One ninteenth century precedent supported Lloyd George's behaviour. Ch 3 op cit 61 & n203 supra.
68. De Smith Constitutional and Administrative Law op cit 55.
69. Ibid. Ramsay MacDonald appears to have been the one Prime Minister of the United Kingdom who did not take advantage of Lloyd George's lead. Ch 3 op cit 62 & n213 supra.
70. De Smith Constitutional and Administrative Law op cit 55. The Prime Minister could still discuss the matter with his colleagues, nevertheless, either privately or in Cabinet meetings. Ibid.
71. Ch 5 op cit 117-118 & nn6-9; n13 & n14 supra.

72. How often a violation must be accepted before a convention can be said to undergo change is not certain. Lloyd George's violation of convention in 1918 led to an immediate change in the relevant conventional rule. Ch 3 op cit 61-62 supra. The violation by Smuts of a similar convention in South Africa during 1924, however, did not lead to a clear alteration of the relevant conventional rule in the Union. N74 infra; and Ch 3 op cit 62-68; & 72 supra.
73. In 1918, for example, Lloyd George could break existing convention because he could rely on the support of his Cabinet colleagues.
During the South African dissolution crisis of 1939, however, Hertzog was unable to rely on a majority of his Cabinet colleagues. Ch 3 op cit 69-71; & nn246-257 supra. This undermined his attempts to obtain a dissolution of Parliament from the Governor-General, and thus prevented him from following the precedent which the British Prime Minister had established. Ibid; & Ch 3 op cit 72 & nn265-266 supra.
74. Dicey op cit 26 n4. During the dissolution crisis of 1939, it was Hertzog's loss of parliamentary support, combined with his loss of Cabinet support, which made his attempt to emulate Lloyd George untenable. Ch 3 op cit 72-73 supra. Hertzog was thus in a very different position from Smuts when the latter breached the convention relating to dissolution in 1924. Op cit 63-64 supra.
75. De Smith Constitutional and Administrative Law op cit 54.
76. Ibid.
77. Ibid.
78. Constitutional conventions must also be based on principle. Ch 5 op cit 134-136 infra.
79. De Smith Constitutional and Administrative Law op cit 55.
80. Ibid.
81. In the United Kingdom, collective Cabinet responsibility was waived in 1975 during the referendum on British membership of the European Economic Community. It was also waived for the purposes of what became the European Assembly Elections Act 1978, because of the deep divisions in the Labour Cabinet and parliamentary party over direct elections to the European Assembly. Op cit 189, and Marshall op cit 215-216. In 1977 the British Prime Minister went so far as to remark: 'I certainly think that the doctrine [of collective responsibility] should apply, except in cases where I announce that it does not.'
De Smith Constitutional and Administrative Law op cit 189.
82. Op cit 56.
83. Marshall op cit 7.
84. Ch 5 op cit 117-118 supra. Rules are obeyed for many reasons, and the fear of sanctions constitutes only one of them. Op cit 117-118 & n14 supra. The importance of sanctions is being deliberately emphasised at this point, however, because Marshall has under-estimated their significance.
85. Marshall questions, for example, whether the 'suspension' of some of the rules of collective responsibility in the United Kingdom in 1932, and again in 1975, should be criticized.

Marshall op cit 8. On the other hand, the Canadian Supreme Court has noted that conventions are normative in character and 'ought' to be obeyed. N15 supra.

86. Marshall describes the breach of some of the rules of collective responsibility merely in terms of political foolishness or imprudence. Marshall op cit 8.
87. Ch 5 op cit 117-118 & n13 supra.
88. At one point Marshall describes one of his right-conferring conventions in terms of a 'firmly maintained usage', and he suggests that it could be deliberately dispensed with. Marshall op cit 8. This description seems to imply something more than the unconcious convergence of behaviour.
89. Ch 3 op cit 48 & n119 supra.
90. Op cit 48 & n120 supra.
91. MacIntosh op cit 533. At 531 he comments:
'... divergence among leading members of a government afford such wonderful openings to its opponents and such evidence of disharmony that they cannot be tolerated.'
In recent years, however, this rule has weakened in the United Kingdom. N81 supra; and MacIntosh op cit 532-533.
92. Ch 3 op cit 46-48 supra.
93. MacIntosh op cit 533. This is illustrated further by MacIntosh in relation to the United Kingdom at 582:
'The second major limitation on the freedom of action of the Prime Minister and his colleagues is the need to carry public support as institutionalised in the House of Commons and in the majority party ... While a government does not need to have the backing of the Press or of the public as revealed in opinion-polls or by-elections or referenda, evident lack of support is a source of weakness which becomes greater with the approach of a general election at which the government may be defeated. For these reasons all ministers pay close attention to both the House of Commons and the other indicators of public feeling ...'
See further; Jennings Cabinet Government op cit 475-480. Similar considerations used to be borne in mind by the South African Prime Minister. Ch 3 op cit 62-64 & nn217-219 supra. Note, the British government has occasionally resorted to 'unauthorised' leaks of information to head off potentially embarassing Ministerial resignations. MacIntosh op cit 533-534.
94. Schire in De Crespigny & Schire (eds) The Government and Politics of South Africa 185.
95. This is assuming, of course, that the members of the Cabinet are drawn from the ranks of only one political party. Wade & Phillips op cit 101. Collective responsibility becomes far more difficult to enforce when there is a coalition of parties in the Cabinet. Ch 3 op cit 51-52 & nn147-152 supra.
96. This echoes the reasons which have been cited by Jennings to explain continued obedience to conventions. Jennings Constitution op cit 132-134. Party loyalty and discipline are crucial to successful government. Jennings Cabinet Government op cit 473-475; and Schire The Government and Politics of South Africa op cit 184.
97. Hart op cit 169.

98. Ibid.
99. Ibid.
100. Ibid.
101. Ibid.
102. Dicey, Jennings and De Smith have gone so far as to assert that some conventional rules are even more important than certain rules of law. Munro (1975) 91 LQR op cit 222-223.
103. The convention relating to the dissolution of Parliament was altered in the United Kingdom during 1918. Ch 5 op cit 124-125 supra. This change cannot be described as having had grave consequences, or having led to distasteful changes in British society.
104. Marshall op cit 217. Dicey has described some conventions as 'trivial'. Dicey op cit 27.
105. Marshall op cit 214-216.
106. Hart op cit 171.
107. Conventional rules may be changed in a variety of ways, including express agreement. Ch 5 op cit 122-126 supra. Conventions may also be created by agreement. Marshall op cit 8-9.
108. Marshall op cit 216-217. An element of agreement is important for determining the existence of all conventions, and not just those which were the product of Colonial and Imperial Conferences. Hence, an element of agreement is required in relation to the 'appropriateness' of those practices, usages or precedents which have been turned into conventions. Ch 5 op cit 133-136 infra.
109. Marshall op cit 217.
110. Ch 5 op cit 123 & n51 supra.
111. Ibid.
112. Hart op cit 173. He has added that to blame someone who has deviated from moral rules or principles in these circumstances would itself be considered to be morally objectionable.
113. Ch 6 op cit 142-144; 147-149; and Ch 7 op cit 196-197 infra.
114. A significant group of MP's, for example, might value their loyalty to established constitutional principle over and above their immediate loyalties to the majority party in the lower House. This situation is most likely to happen when the MP's concerned believe that their government is out of touch with constituency or public opinion - to which the MP's themselves are ultimately accountable. See generally, Jennings Cabinet Government op cit 475-480. The number of MP's who would behave in this way would be difficult to predict in advance.
115. The breach of convention by the British Prime Minister in 1918 was hardly of fundamental importance. Consequently, the response to the breach was muted. Ch 3 op cit 61-62; and Ch 5 op cit 124-125 supra. A refusal by the government to resign after being defeated on a motion of no confidence in the lower House is an entirely different matter, however. Such a breach of convention threatens the very foundations of the modern, democratic state. Ch 5 op cit 119-120 & n22 supra. The legislature could not be expected to accept a breach which questions the reason for Parliament's very

existence.

116. Hart op cit 175-176.
117. Op cit 175.
118. Ibid.
119. Ibid.
120. Ibid. At 175 this is qualified when he says:
'In the background there are indeed the 'internal' moral analogues of fear of punishment; for it is assumed that protests will awaken in those addressed a sense of shame or guilt: they may be 'punished' by their own conscience.'
Furthermore, he concedes that occasionally, threats or appeals to self-interest will accompany distinctively 'moral' appeals. Op cit 175-176.
121. Op cit 175-176.
122. Dicey op cit 26 n4; & 445-446.
123. Jennings Constitution op cit 132-134; Wade & Phillips op cit 21. In 1975 Eric Heffer was forced to resign from the British Cabinet because he refused to obey the convention of collective responsibility. He had insisted upon speaking out against government policy in the House of Commons. Wade & Phillips op cit 20-21; & 102.
124. Conventions are normative in character. N15 supra. Accordingly, breach of these rules may give rise to feelings of shame or guilt. N120 supra.
125. Marshall op cit 8-10.
126. Op cit 8-9; Hood Phillips op cit 110; Wheare Modern Constitutions op cit 122; and Reference re Amendment of the Constitution of Canada (Nos 1, 2, and 3) 125 DLR (3d) 1 at 90.
127. Marshall op cit 9; Hood Phillips op cit 110; and Wheare Modern Constitutions op cit 122.
128. Jennings Constitution op cit 134.
129. Marshall op cit 9; Hood Phillips op cit 110; and Jennings Constitution op cit 134.
130. Jennings Constitution op cit 134.
131. Hood Phillips op cit 110.
132. Ibid.
133. Marshall op cit 11. This attitude has been adopted by Wheare in the following observation:
'By 'convention' is meant a binding rule, a rule of behaviour accepted as obligatory by those concerned in the workings of the Constitution ...'
Wheare Modern Constitutions op cit 122.
134. See generally, Wade & Phillips op cit 17.
135. Marshall op cit 11.
136. Ibid.
137. Marshall op cit 11-12; and Jennings Constitution op cit 134-136. It has been suggested that MacIntosh was a proponent of the descriptive approach. Wade & Phillips op cit 16-17. MacIntosh seemed to align himself with Jennings, however, especially when he observed:
'... as Viscount Esher said: "precedent, like analogy, is rarely conclusive", and by this he means that it is rarely conclusive by itself. The added force arises from agreement that the actions quoted as precedents were correct and that

the reasons for holding them correct are still applicable ... Thus a valid precedent and good judgment in a new situation both rest on an understanding of the facts of the case followed by the line of action which is best calculated to further the underlying principles of the current British political system.'

138. Reference re Amendment of the Constitution of Canada (Nos 1, 2, and 3) 125 DLR (3d) 1 at 90.
139. Jennings Constitution op cit 135-136. He says:
'It is sometimes said that the King's choice of Mr Baldwin in 1922, instead of the Marquis Curzon, created the convention that the Prime Minister must always be in the House of Commons. .It certainly did not if the King did not regard himself as bound by such a rule: and even then it might be that he was mistaken in thinking himself so bound. For neither precedents nor dicta are conclusive.'
Ibid.
140. Op cit 136.
141. Ibid.
142. Ibid.
143. Ibid. Hence, conventions must help to reduce friction in the workings of the machinery of State. Ibid.
144. Ibid. The 'democratic principle' is one of the four fundamental principles of a Westminster system. Ch 1 op cit 2 & n9 supra; and Jennings Cabinet Government op cit 13-19. In South Africa, however, this principle has been tempered by other important factors. Ch 1 op cit 10-11 & nn56-62 supra. The unique characteristics of the South African system of government should be borne in mind whenever a study of existing South African conventions is being undertaken. Ch 7 op cit 202-204; & 213-225 infra.
145. Jennings op cit 136.
146. The obligatory character of constitutional conventions has always been to a certain extent fictitious. Ch 5 op cit 118-119; & 120-126 supra.
147. Wade & Phillips op cit 17.
148. Ibid.
149. Marshall op cit 12.
150. Ibid.
151. Ibid. Conventions arise, not only from precedent or agreement, but also as a product of an acknowledged principle of government. As far as this third group of conventions is concerned Marshall has said:
'Thirdly, however, a convention may be formulated on the basis of some acknowledged principle of government which provides a reason or justification for it. Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way.'
Op cit 9. The prescriptive approach to the creation of convention makes particular sense in this context.
152. Op cit 12.
153. Ch 7 op cit 215-223 infra.

CHAPTER VI

FOOTNOTE AUTHORITIES

1. These analyses are closely related. Ch 6 op cit 153-160; & 163-166 infra.
2. Dicey An Introduction to the Study of the Law of the Constitution 23-24.
3. Op cit 23-24; 417,; 422 & 439.
4. Ibid.
5. Op cit 422.
6. Ch 5 op cit 118-121 supra.
7. Op cit 119 & nn23-24 supra.
8. Ibid.
9. Dicey op cit 442-445.
10. Op cit 442.
11. Op cit 443.
12. Erskine May's Parliamentary Practice by Sir Barnett Cocks (ed) 62-63.
13. Dicey op cit 443.
14. Ibid.
15. Ibid.
16. Op cit 443-444.
17. Ch 5 op cit 119-120 supra. By virtue of the Meeting of Parliament Act 1694 not more than three years may elapse between the dissolution of one Parliament and the meeting of its successor. De Smith Constitutional and Administrative law 235.
18. The last cases of Impeachment were those of Warren Hastings in 1788, and Lord Melville in 1805. Erskine May's Parliamentary Practice op cit 63.
19. Originally, the powers and privileges of the South African legislature were regulated by the Powers and Privileges of Parliament Act No 19 of 1911. This statute was subsequently replaced by the Powers and Privileges of Parliament Act No 91 of 1963. VerLoren Van Themaat Staatsreg 2ed 298-299.
20. In the United Kingdom, the process of Impeachment requires the participation of both the House of Commons and the House of Lords. The Commons first have to find the crime, and then, as prosecutors, support their charge before the Lords. It is the House of Lords alone which tries and adjudicates upon the charge preferred. Erskine May's Parliamentary Practice op cit 62-63. In South Africa, neither the Powers and Privileges of Parliament Act No 19 of 1911, nor the Powers and Privileges of Parliament Act No 91 of 1963 specifically dealt with the procedure for Impeachment. It is suggested, however, that the wording of the 1911 Act excluded the Impeachment procedure from the ambit of the South African Parliament. S 36 of the 1911 Act was a general, residual provision. It laid down that:

    > 'Save as is otherwise expressly provided by this Act, the Senate and the House of Assembly of the Union of South Africa, or either of them ... respectively shall hold enjoy and exercise such and the like privileges, immunities and powers as at the time of the

promulgation of the South Afica Act, 1909, were held enjoyed exercised by the Commons House of the United Kingdom and by the members thereof ... Provided always that no such privileges, immunities, or powers shall at any time exceed those at the same time held and exercised by the Commons House of the said Parliament and by the members thereof.'

It has already been noted that the House of Commons cannot try and adjudicate the issues in an Impeachment. The right of adjudication is vested in the House of Lords alone.

For all practical purposes, the residual clause in the 1963 Act made no difference to this situation. S 36 of the 1963 Act laid down:

'Save as is otherwise expressly provided by this Act, the Senate, the House of Assembly, a member and an officer of Parliament, respectively, shall have all such privileges, immunities and powers as at the time of the promulgation of the Republic of South Africa Constitution Act, 1961, were applicable in the case of the Senate and the House of Assembly of the Parliament of the Union of South Africa and any member or officer thereof....'

21. VerLoren Van Themaat 2ed op cit 266-267. The relevant provision is to be found in the Republic of South Africa Constitution Act No 32 of 1961 s 10. An equivalent provision is to be found in the most recent, and current constitution of South Africa. Republic of South Africa Constitution Act No 110 of 1983 s 9.
22. Dicey op cit 444-445.
23. Op cit 444.
24. Ibid.
25. Ibid.
26. Op cit 444-445.
27. Op cit 445. Dicey's assertion has oversimplified the reasons which explain obedience to the law. cf Jennings The Law and the Constitution 341-346.
28. Positivism in the sense that this would be understood by John Austin. Walker The Oxford Companion to Law 969-970.
29. Dicey op cit 445.
30. Ibid.
31. Ibid; and Ch 5 op cit 119-120 supra.
32. Dicey op cit 445.
33. Op cit 445-446. At 450-451 this is re-emphasized when he says:

'We have then a right to assert that the force which in the last resort compels obedience to constitutional morality is nothing else than the power of the law itself. The conventions of the constitution are not laws, but, in so far as they really possess binding force, derive their sanction from the fact that whoever breaks them must finally break the law and incur the penalities of a law-breaker.'

34. Op cit 446-451. The law which regulates the maintenance of the British armed forces was substantially amended in 1955. Ch 5 op cit 119-120 & nn25 & 30 supra.

35. The British armed forces cannot survive without the enactment of the annual Appropriation Act. Ch 5 op cit 119-120 & n30 supra. Certain taxes cannot be levied, and absolutely no government revenues can be spent without annual legislative authorisation. Ch 5 op cit 119-120 & n26 supra. Consequently, the armed forces are as dependent on the passage of the Appropriation Act as any other recipient of government spending.
36. Ch 5 op cit 119-120 & n26 supra.
37. Dicey op cit 448-449.
38. Op cit 449.
39. Op cit 450.
40. Ibid; and nn 35-36 supra.
41. Dicey op cit 450.
42. Op cit 451-453.
43. Op cit 451-452.
44. Ibid.
45. Ibid.
46. Ibid.
47. Op cit 451.
48. Op cit 452-454. See more recently Wade and Bradley's Constitutional and Administrative Law by Bradley (ed) 196; 286; & 406-408.
49. Dicey op cit 452-453.
50. Ch 5 op cit 120-121 & n33 supra.
51. Dicey op cit 26 n4.
52. Ch 5 op cit 119 & n23 supra.
53. Munro 'Laws and Conventions Distinguished' (1975) 91 LQR 221.
54. Jennings Constitution op cit 84.
55. Op cit 117 & 127. At 127 he concedes that a 'substantial distinction' exists between law and convention if it is accepted that 'law' is enforced by the courts. He accepted that although courts may 'recognise' conventions, there is no court to enforce them.
56. Op cit 117.
57. Op cit 133-134. He is not convinced that legal sanctions would ever have been effective. N58 infra.
58. Op cit 117-118. Jennings argued that law cannot be 'enforced' against the government. A government obeys the law because it chooses to do so. Op cit 131-132.
59. Op cit 128-129. Note, the Army (Annual) Act was superceded by the Army and Air Force (Annual) Act after the establishment of a separate Air Force in 1917. Dicey op cit 295 n1. For the current statutory position, see Wade and Bradley's Constitutional and Administrative Law op cit 406-408.
60. Jennings Constitution op cit 128-129,
61. At no stage did Dicey infer that the breach of law would be immediate. At one stage he remarked:

    'Sooner or later the moment would come for the passing of the Army (Annual) Act ...' Dicey op cit 450. At a later stage he observed:

    'The breach, therefore, of a purely, conventional rule ... ultimately entails ... direct conflict with the

undoubted law of the land.'

Ibid.

62. Jennings Constitution op cit 129.
63. Ibid.
64. Ibid.
65. Ibid; and Ch 5 op cit 119-120 & n26 supra.
66. Jennings Constitution op cit 130.
67. Op cit 129-130.
68. Ibid.
69. Op cit 130.
70. Ch 5 op cit 120-121; and Ch 6 op cit 143-144 supra.
71. Dicey op cit 26 n4. Jennings seemed to be unaware of these comments. Jennings Constitution op cit 130.
72. It would be absurd for Parliament to threaten to cut supply over the breach of a convention of secondary importance. Thus, when convention was breached in 1918, and dissolution was sought without cabinet concurrence, it would have been ludicrous for Parliament to respond by rejecting the subsequent Appropriation Bill. Ch 3 op cit 61-62 supra.
73. Jennings Constitution op cit 132-134.
74. Op cit 132.
75. Op cit 133-134.
76. Jennings believed that conventions are always directed to secure that the constitution works in practice in accordance with the prevailing constitutional theory of the time. Jennings Constitution op cit 83. The most important aspect of this constitutional theory is the principle of 'democracy'. Jennings Cabinet Government 13-19. Respect for the conventions and respect for the political feeling of the House of Commons are therefore closely linked. In this context Jennings is echoing similar sentiments to those expressed by Dicey. Ch 5 op cit 119 & n23 supra.
77. MacIntosh The British Cabinet 582.
78. Comments by E.C.S Wade in Dicey op cit clxxx. Wade remarked:

    'Ministers do not shrink from responsibility for fear of proceedings in court. Their conduct is conditioned by force of public opinion as shown by an adverse vote at the polls or by the estrangement of some of their supporters in the House of Commons.'

    Force of public opinion would appear to have a similar influence over individuals who violate convention in a distinctly personal capacity. Wade and Phillips op cit 22.
79. Jennings Constitution op cit 134. See also Wade and Phillips op cit 21.
80. The life of the United Kingdom Parliament has been altered on a number of occasions. Alterations took place, for example, with the enactment of the Septennial Act 1716 1 Geo 1 C 38; and the Parliament Act 1911 1 & 2 Geo V C 13. Annual extensions were enacted during both world wars. Wade and Phillips op cit 161-162. The passing of the Septennial Act in 1716 represented a constitutional landmark in the United Kingdom. It amounted to a clear assertion of Parliament's legislative sovereignty, and amounted to a rejection of the notion that Parliament is the agent of the

electors or trustee for its constituents. Dicey op cit 44-48.

81. Dicey op cit 39-43; 44-48; 59; 68-70; 72-73 & 87-91.
82. Op cit 76-82.
83. Op cit 76-77. This idea is adopted by Jennings to discredit Dicey's assertion that law and convention are distinct. Jennings Constitution op cit 117-118 and 336-346. Dicey has never denied the influence of political factors, however, on those who exercise power. Dicey op cit 71; & 76-82. See further Wade in Dicey op cit clxxx.
84. Dicey op cit 78.
85. Ibid.
86. Op cit 79.
87. Ibid.
88. The life of Parliament was extended, however, during both world wars. Wade and Phillips op cit 161-162. War-time circumstances may be regarded as exceptional, which justify the postponement of elections.
89. Such an enactment would be totally out of keeping with the prevailing constitutional theory of 'democracy'. Jennings' Cabinet Government 13-19.
90. Jennings Constitution 117-118; & 336-346.
91. Ibid.
92. Dicey op cit 80.
93. Op cit 81-82.
94. Ibid.
95. Wade in Dicey op cit clxxx.
96. This notion is closely allied to the concept of 'legitimacy'. The latter describes the capacity of a constitutional system to engender and maintain the belief that the existing political institutions are the most appropriate ones for society. This belief, necessarily, is a subjective perception on the part of those affected by the relevant political authority. Boulle South Africa and the Consociational Option - a constitutional analysis 3.
97. Jennings believed that 'democracy' was the fundamental constitutional principle at the heart of the British system of government. He asserted that the constitution is 'democratic' because government is carried on in the name of the 'people', according to doctrines freely accepted by, or acceptable to the 'people' at a general election. Jennings described 'the people' as British subjects of full age, resident in the United Kingdom and not subject to legal disqualification. He was referring, in other words, to the British electorate. Jennings Cabinet Government 13-19.
98. Jennings Constitution op cit 83; 136; and n97 supra; and Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3) 125 DLR (3ed) 1 per Martland, Ritchie, Beetz, Chouinard and Lamer JJ at 84 where the following comments were made obiter:

> 'The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of

> the conventions ... relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate...'

These comments were made with specific reference to the conventions which exist in Canada.

99. The extent of the attachment of the electorate to the values of democratic government would ultimately determine the future of such conventions. Physical rebellion against those in authority would be one of the options open to the adult population.
100. Nn 2-5 supra.
101. Nn 54-58 supra.
102. Jennings was at pains to provide a theory of the reasons for obedience to legal rules. Jennings Constitution op cit 117-118 & 337-346.
103. Munro (1975) 91 LQR op cit 220-221.
104. Op cit 221-222; & 231-235.
105. Ibid. He comments at 221:

> '... even if it could be shown that obedience to laws and to conventions rested on the same grounds, this would show nothing about the similarity or otherwise of laws and conventions. A sufficiently weak-willed man might exhibit a total obedience when told he ought to do something by his wife, his mother, a policeman, a traffic signal, and a talking parrot. But this is not to say that his wife can be compared with her mother-in-law, nor that either may be equated with a traffic light or a parrot. An inference about the nature of the man might be justified, but we can learn nothing about the relationship between the objects of his obedience.'

106. Op cit 225-231; & 233. Munro has subsequently reiterated his views. Munro 'Dicey on Constitutional Conventions' (1985) Public Law 637-649.
107. Munro (1975) 91 LQR op cit 231.
108. Ch 6 op cit 159-161 infra.
109. Munro (1975) 91 LQR op cit 231 & n68.
110. Ibid.
111. Op cit 231-232.
112. Op cit 231-235. cf Maley 'Laws and Conventions Revisited' (1985) 48 MLR 121-138.
113. Munro (1975) 91 LQR op cit 232.
114. Ibid; and Hart The Concept of Law 89-90.
115. Munro (1975) 91 LQR op cit 232.
116. Ibid; and Hart op cit 91.
117. Munro (1975) 91 LQR op cit 232; and Hart op cit 90.
118. Munro (1975) 91 LQR op cit 232; and Hart op cit 90-91.
119. Conventions are 'normative' rules. Ch 5 op cit 118 & nn14-15 supra. Hart's description of the external and internal aspect of rules is most illuminating in this context. Hart op cit 83-88.
120. Munro (1975) 91 LQR op cit 232.
121. Ibid; and Hart op cit 92-93.
122. Munro (1975) 91 LQR op cit 232; and Hart op cit 93-95.

123. Hart op cit 89-90.
124. Op cit 90.
125. Ibid.
126. Op cit 92-93.
127. Ibid.
128. Op cit 92.
129. Op cit 92-93.
130. Munro (1975) 91 LQR op cit 232-233.
131. It was noted that the existence of a conventional rule may be the subject of dispute. Ch 5 op cit 119; 126-127 & n19 supra. The recognition of a conventional rule may be especially difficult if the purported rule in question is vague. Ch 5 op cit 120-121 & nn 33-38 supra. The question of how and when conventions come into existence may be full of controversy. Ch 5 op cit 133-136 & nn131; 145; & n152 supra. Note, the supposed incompatability of conventional rules with the Rule of Recognition has been challenged. Maley (1985) 48 MLR op cit 131-133.
132. Ch 5 op cit 126-127 & n82 supra.
133. Op cit 126 & n80 supra.
134. Hart op cit 90-91.
135. Op cit 90.
136. Op cit 93-94.
137. Op cit 93.
138. Munro (1975) 91 LQR op cit 233.
139. Ch 5 op cit 133-136 supra.
140. Op cit 122-126 supra.
141. Op cit 123 & n53 supra.
142. Hart op cit 91.
143. Ibid.
144. Op cit 94-95. Hart refers to 'Rules' of Adjudication rather than to one all-embracing secondary rule. The singular is being adopted in the text as a convenience of style.
145. Op cit 94.
146. Ibid.
147. Ibid.
148. Ibid.
149. Ibid.
150. Munro (1975) 91 LQR op cit 233.
151. Op cit 233-234. Hart has noted that in a legal system, secondary rules of adjudication have conferred exclusive power on the judges to direct the application of penalties by other officials. These rules provide the centralised, official 'sanctions' of the sytem. Hart op cit 95.
152. Ch 5 op cit 117-127; & 133-136 supra.
153. Ch 6 op cit 154-155 & nn106-107 supra.
154. He has said that there is no final judge of their violation, and they are generally self-interpreted by those to whom they apply. Ch 6 op cit 160 & nn150-151 supra.
155. The rules of Recognition, Adjudication and Change are closely inter-related. Munro (1975) 91 LQR op cit 232. Each one of these secondary rules implies a role for a judicial authority. A court may determine which rules are legal rules. It may amend or repeal those rules at any time. It may declare the circumstances in which any of

these legal rules have been breached, and it may prescribe penalties for a known violator.

156. Jennings Constitution op cit at 117-127; & 131-134.
157. Op cit 127.
158. Op cit 122-127.
159. Op cit 127
160. Madzimbamuto v Lardner-Burke [1969] 1 AC 645.
161. Op cit 722-723. The opinion of the Judicial Committee was delivered by Lord Reid.
162. It is respectfully submitted that Munro has emphasised an excerpt from the Judicial Committee's opinion which has been taken out of context. Munro (1975) 91 LQR op cit 228. The words he has italicised 'Their Lordships in declaring the law are not concerned with these matters' must be read in conjunction with the sentence which immediately follows it. The relevant sentence says: 'They are only concerned with the legal powers of Parliament' (Underlining added). It is submitted that this final sentence restricts the meaning of the more general one which precedes it to the context of Parliamentary Sovereignty. See further, Maley (1985) 48 MLR op cit 135-136.
For an up-to-date description of Parliamentary Sovereignty in the United Kingdom, see Wade and Bradley's Constitutional and Administrative Law op cit 64-75; & 79-80.
163. Wade and Bradley's Constitutional and Administrative Law op cit 64; 66-67; & 70-75.
164. Reference re Amendment of the Constitution of Canada (No's 1, 2 and 3) 125 DLR (3d) 1. A summary of this case, and some of the background issues which gave rise to the court reference are explained in Wade and Bradley's Constitutional and Administrative Law op cit 730-733.
165. Although Laskin CJC, Estey and McIntyre JJ issued a dissenting judgment, they were in full agreement with the other Supreme Court judges with regard to the general nature of conventional rules. Reference re Constitution op cit 1 per Laskin CJC, Estey and McIntyre JJ at 110.
166. Reference re Constitution op cit 1 at 84-85 (underlining added).
167. Op cit 85. The court also referred to the constitutional convention which requires a government to resign if the Opposition obtains a majority after General Elections have been held. Op cit 86.
168. Op cit 85. The court was describing convention in a strictly Canadian context. It declined to pronounce any authority on conventions in a British context. Op cit 21.
169. Op cit 85 (Underlining added).
170. Ibid.
171. Ibid.
172. Op cit 86.
173. Op cit 22-28; & 86.
174. Op cit 22; 25-26; 28; & 86. At 28 the court declared:

> 'As to all the cases cited, it must be said that there is no independent force to be found in selective quotations from a portion of the reasons unless regard is had to issues raised and the context in which the quotations are

found.'

175. Op cit 22; & 86.
176. Op cit 22; & 29.
177. Ibid.
178. The court distinguished the crystallization proposition of Duff CJC in Attorney-General for Canada v Attorney General for Ontario, Reference re Weekly Rest in Industrial Undertakings Act [1936] 3 DLR 673. The 'Labour Conventions' case as it is often named was distinguished by the Canadian Supreme Court in the following terms. Reference re Constitution op cit 24:

> 'What the learned Chief Justice was dealing with was an evolution which is characteristic of customary international law; the attainment by the Canadian federal executive of full and independent power to enter into international agreements ... International Law perforce has had to develop, if it was to exist at all, through commonly recognised political practices of States, there being no governing constitution, no legislating authority, no executive enforcement authority and no generally accepted judicial organ through which international law could be developed. The situation is entirely different in domestic law, in the position of a State having its own governing legislative, executive and judicial organs and, in most cases, an overarching written constitution.' (Underlining added).

The Canadian Supreme Court went on to cite the opinion of Duff CJC in Reference re Power of Disallowance and Power of Reservation [1938] DLR 8 at 13. See Reference re Constitution op cit 25. This demonstrated that Duff CJC rejected the crystallization theory in a domestic law setting. Jennings placed considerable emphasis on Duff CJC's opinion in the 'Labour Conventions' case. Jennings Constitution op cit 125-127. Jennings believed that the Labour Conventions case demonstrated that the Court-enforcement criterion was weakening, and that conventions are applied by the Courts. Jennings failed to mention Duff CJC's opinion in the subsequent 'Power of Reservation and Disallowance' case. It is respectfully submitted that Jennings' support for the crystallization theory must now be seriously questioned. VerLoren Van Themaat has asserted that binding conventional rules are 'law'. He has argued that a definition of law in terms of those legal rules which can be enforced by the courts is influenced by an untenable Positivist view of the legal system. VerLoren Van Themaat Staatsreg 3ed 173-176. He asserts that binding conventions should be classified as Customary law in the following terms. Op cit 175:

> 'Die verkieslikste opvatting is om konvensies wat bindende krag besit wel as reg, en dan as gewoontereg, te beskou. Ander konvensies kon beskou word as toekomstige gewoontereg, wat nog in 'n stadium van ontwikkeling is. Slegs daardie konvensies behoort as regsreëls erken te word, wat al werklik seker en

bindend is.'
In the light of the Canadian Court's reconsideration of the opinions of Duff CJC, it is respectfully submitted that VerLoren Van Themaat's description of conventions as 'gewoontereg' is incorrect.

179. Reference re Constitution op cit 22.
180. The Supreme Court stressed that conventions are the product neither of judicial precedent nor statute law. Reference re Constitution op cit 84-85. Conventions, thus, fall beyond the scope of the legal system as determined by the rule of Recognition. Ch 6 op cit 156-158 supra. The Supreme Court noted that conventions are political in inception and are based on precedents established by the institutions of government themselves. Reference re Constition op cit 22; 84-85; & 86. The courts, therefore, have no role to play as far as the introduction, amendment and repeal of conventions is concerned. Conventions fall outwith the ambit of the rule of Change which regulates these matters in a legal system. Ch 6 op cit 158-159 supra. The Supreme Court noted that it is unable to enforce constitutional conventions, because these are generally in conflict with established legal rules. It also noted that the sanctions for breach of convention are political in character rather than legal. Reference re Constitution op cit 84-86. Conventions, therefore, fall outwith the terms of the rule of Adjudication in a legal system. Ch 6 op cit 159-160 supra.
181. N 180 supra.
182. Jennings Constitution op cit 127.
183. The incorporation of constitutional conventions into law will be examined in Ch 7 op cit 204-211 infra.
184. Reference re Constitution op cit 87. This is a modern reformulation of the equation which Dicey had once propounded. Dicey op cit 24.

CHAPTER VII

Footnote Authorities

1. The basic characteristics of the 'Westminster' system were described elsewhere. Ch 1 op cit 1-2 supra. A more complete description of the Westminster system has been provided by Van Der Vyver. Basson and Viljoen Suid-Afrikaanse Staatsreg 214.
2. None of South Africa's Constitutions have ever complied with all the basic requirements of a Westminster system of government. The lack of universal suffrage has been the most obvious South African deviation from 'Westminster' model norms. The procedural testing rights of the courts in relation to entrenched clauses is another deviation which is significant. Basson and Viljoen op cit 214-215; and Ch 1 op cit 10-11 & nn 55-63 supra.
3. Ch 5 op cit 119-120 & n26 supra.
4. Ibid.
5. Op cit 119-120 & n30 supra.
6. South Africa Act 1909 9 Edw VII C 9.
7. Kennedy and Schlosberg The Law and Custom of the South African Constitution 156 & 158. The first example of such an Act in the Union of South Africa was the Appropriation (1910-1911) Act No 7 of 1910. Another example was the Railways and Harbours Appropriation (Part) Act No 7 of 1911.
8. Kennedy and Schlosberg op cit 156 & 158. The limited duration of an Appropriation Act was apparent even in the very earliest example of such an Act in the Union. The Appropriation (1910-1911) Act No 7 of 1910 S 1 declared:
   > 'The Consolidated Revenue Fund is hereby charged towards the service of the Union for the period from the thirty-first day of May 1910, to the thirty-first day of March 1911, both days inclusive, with a sum of ...'

   It is interesting to note, however, that s 1 of the Railways and Harbours Capital and Betterment Works Appropriation (1910-1912) Act No 31 of 1911 authorized an appropriation for the period covering 31st May 1910 to 31st March 1912. Withdrawals which were not authorized in terms of an existing Appropriation Act were permitted in strictly limited circumstances by s 26 of the Exchequer and Audit Act No 21 of 1911. This section permitted withdrawals of up to three hundred thousand pounds under special warrant of the Governor-General to meet unforseen and necessary expenditure, or expenditure which had been in excess of amounts so provided. All sums of money withdrawn under s 26 had to be submitted for appropriation to Parliament by the next ensuing session. Kennedy and Schlosberg op cit 156. The provisions in s 26 were eventually superceded by new legislation in 1958. See n12 infra.
9. Exchequer and Audit Act No 21 of 1911. Note, the Exchequer Account contained the revenues of the Consolidated Revenue Fund. See Exchequer and Audit Act No 21 of 1911 s 3:
   > ' "Exchequer Account" shall mean the account of the

Exchequer of the Union of South Africa as prescribed in this Act, and shall include the account of the Consolidated Revenue Fund ...'

10. Exchequer and Audit Act No 23 of 1956 s 33:

'No Appropriation Act shall be construed as authorizing moneys appropriated thereby to be expended in any financial year other than the financial year to which it is expressed to relate, and any moneys so appropriated which may be unexpended at the close of any financial year shall be surrendered to the Exchequer Account'.

This provision was eventually superceded by new legislation in 1975. See n16 infra. The definition of the term 'Exchequer Account' in s 3 of the Exchequer and Audit Act No 21 of 1911 was retained in s 1 of the Exchequer and Audit Act No 23 of 1956.

11. Republic of South Africa Constitution Act No 32 of 1961. Hereafter, this Act will be referred to in the text as the '1961 Constitution Act', or 'the 1961 Act' as the occasion requires.

12. S 24 of the Exchequer and Audit Act No 23 of 1956 permitted withdrawals which were not authorized by an existing Appropriation Act. It did so in terms which were reminiscent of s 26 of the previous Exchequer and Audit Act No 21 of 1911. See n8 supra. The wording in s 24 of the 1956 Act, however, increased the amount which could be withdrawn to three million Pounds. s 24 of the 1956 Act was itself superceded by new legislation in 1975. See n16 infra.

13. Exchequer and Audit Act No 66 of 1975 s 52(1).

14. Exchequer and Audit Act No 66 of 1975 s 1 declared:

' "revenue" means all moneys received by way of taxes, imposts or rates and all casual and other receipts of the State, whatever the source, which may be appropriated by Parliament, and includes moneys borrowed in terms ... of this Act, but does not include ... revenue accruing to the Railways and Harbours Fund, the Post Office Fund, and a provincial revenue account.'

15. A Post Office Fund was established in 1968 by the Post Office Re-adjustment Act No 67 of 1968. S 3(1) laid down:

'There is hereby established a fund, to be known as the Post Office Fund, into which shall be paid all revenues which are or have been raised from the affairs of the department on or after 1st April 1968, and the said fund shall be appropriated by Parliament for the purposes of the department in the manner prescribed by this Act.'

S 4(1) declared:

'Subject to the provisions of the Exchequer and Audit Act, 1956 (Act No 23 of 1956) no money shall be withdrawn from the fund, except under appropriation made by law'.

The term 'department' was defined in s 1(ii) as the Department of Posts and Telegraphs. This Act was repealed

by s 52 (1) of the Post Office Amendment Act No 113 of 1976. The 1976 Act inserted ss 12 D(i); 12E; 12F; & 12G into the Post Office Act No 44 of 1958. These sections now regulate the Post Office Fund. They require Department of Posts and Telecommunications expenditure to be defrayed from the fund in accordance with annual Post Office Appropriation Acts. The legal requirement of parliamentary authorization of expenditure has therefore been maintained. Provincial Revenue Funds for each of the four provinces have existed from the establishment of Union in 1910. South Africa Act 1909 s 89; and Republic of South Africa Constitution Act No 32 of 1961 s 88. Appropriation of provincial revenues was authorized by the Provincial Council concerned. See South Africa Act 1909 ss 89-90; and Republic of South Africa Constitution Act No 32 of 1961 s 88(1). This position was altered by the Provincial Finance and Audit Act No 18 of 1972 s 34. The effect of s 34 was to amend s 88(1) & (2) of the Republic of South Africa Constitution Act No 32 of 1961. The amended s 88(2) declared:

> 'No moneys shall be withdrawn from a provincial revenue fund except in accordance with an Act of Parliament.'

16. The annual nature of Appropriation Acts remained unchanged. S 33 of the Exchequer and Audit Act No 23 of 1956 was basically re-enacted in s 5(1) of the Exchequer and Audit Act No 66 of 1975 as follows:

> 'An appropriation Act shall not be construed as authorizing the utilization of moneys appropriated thereby in a financial year other than the financial year to which it expressly relates.'

It should be noted that s 7(1) of the Exchequer and Audit Act permits withdrawals which are not authorized by an existing Appropriation Act. The new provision is reminiscent of s 24 of the previous Exchequer and Audit Act No 23 of 1956. The new provision allows for greater flexibility in the amounts which can be withdrawn, however. Moneys can be withdrawn up to an amount equal to two percent of the total amount appropriated by the then current Appropriation Act or part Appropriation Act. S 7(2) of the 1975 Act still requires these sums to be appropriated by Parliament before the end of the ensuing parliamentary session.

17. Railways and Harbours Acts Amendment Act No 67 of 1980. By the time it was excised in 1980, s 99 of the 1961 Act had already been amended. Changes had been introduced by the Railways and Harbours Finances and Accounts Act No 48 of 1977 s 25. At the time of its abolition in 1980, therefore, s 99 of the 1961 Constitution Act (as amended by s 25 of Act No 48 of 1977) read as follows:

99(1) 'There shall be a Railway and Harbour Fund into which shall be paid all revenue as defined in section 1 of the Railways and Harbours Finances and Accounts Act, 1977, and all moneys obtained as loans in terms of section 15 and 16 of that Act.'

(2) 'No moneys shall be withdrawn from the Railway and Harbour Fund except in accordance with an Act of

Parliament.

18. Railways and Harbours Finances and Accounts Act No 48 of 1977 s 2(1) & (2).
19. Railways and Harbours Acts Amendment Act No 67 of 1980 s 21(1).
20. S 2(1) & (2) of Act No 48 of 1977 (as amended by s 21(1) of Act No 67 of 1980) laid down:
    2(1) 'There shall be a Railway and Harbour Fund into which shall be paid all revenue as defined in section 1 and all moneys obtained as loans in terms of section 15 and 16.
    (2) 'No moneys shall be withdrawn from the Railway and Harbour Fund except in accordance with an Act of Parliament'.
21. South African Transport Services Finances and Accounts Act No 17 of 1983.
22. N21 supra.
23. Act No 17 of 1983 s 18:
    'Any reference to the Railway and Harbour Fund in any other law contained, shall be deemeed to refer to the moneys of the South African Transport Services.'
24. Act No 17 of 1983 s 4(1):
    'Money shall be appropriated by Parliament by an Appropriation Act for the expenditure requirements of the South African Transport Services: Provided that until such time as provision has been made in respect of a financial year for such requirements in an Appropriation Act, Parliament may by a Part Appropriation Act appropriate a portion of the money necessary for such requirements : Provided further that such a part Appropriation Act shall cease to have effect on the coming into operation of the Appropriation Act for that financial year and disbursements made under such a Part Appropriation Act shall be deemed to be disbursements under that Appropriation Act.'
25. Act No 17 of 1983 s 5(1) re-enforces the annual cycle of parliamentary control. S 5(1) says:
    'Subject to the provisions of section 7(2), an Appropriation Act shall not be construed as authorizing the utilization of money appropriated thereby in respect of a financial year other than that to which it expressly relates.'
    S 7(1) of the Act empowers the Minister to grant authority for money to be made available to defray expenditure of an exceptional nature for which provision has not been made in an Appropriation Act, or to cover expenditure which has been in excess of amounts so provided. S 7(2) requires that these sums be submitted for parliamentary appropriation in the following terms;
    'Particulars of amounts spent under authority in terms of subsection (1) shall be submitted to Parliament by the Minister ... for the financial year immediately following the financial year in respect of which the said amounts have been spent, for appropriation of the

amounts in question.'

Note: the amounts which the Minister has authority to make available under s 7(1) cannot exceed a sum equal to two per cent of the total amount appropriated by the Appropriation Act or Part Appropriation Act then in force.

S 13 of the 1983 Act is somewhat disturbing, however. It says that any unauthorised expenditure which is not covered by a current Appropriation Act, or Ministerial authorization (under s 7), is to be submitted to Parliament for sanction as soon as possible. The tone of s 13 suggests, however, that parliamentary approval is automatic. This assumption may be said to underlie s 13(2) which declares:

> 'Any expenditure that is inconsistent with a provision of an Act shall, as soon as is practicable, be submitted to Parliament for validation'

26. Case of Ship Money (R v Hampden) (1637) Tr 825.
27. Wade and Bradley's Constitutional and Administrative Law op cit 61-62.
28. VerLoren Van Themaat Staatsreg 2ed 98-101. Ship Money tax was abolished by the Ship Money Act 1640 16 Car 1, C.14.
29. VerLoren Van Themaat 2ed op cit 100-104.
30. Bill of Rights 1689 1 Will and Mary, sess 2, C.2
31. A previous, ultimately unsuccessful attempt to prohibit the levying of taxes without parliamentary assent had been contained in the Petition of Right 1629 3 Car 1 C.1. Wade and Bradley's Constitutional and Administrative Law op cit 14; and VerLoren Van Themaat 2ed op cit 96-98.
32. Calvin's Case 7 Cokes Reports 1; 2 St Tr 559.
33. VerLoren Van Themaat 2ed op cit 49, and Keith Constitutional History of the First British Empire 9-10.
34. Campbell v Hall 98 ER 1045.
35. Campbell v Hall 98 ER 1045 per Lord Mansfield at 1048.
36. Op cit 1048-1049
37. Ibid.
38. Op cit 1047.
39. One of the oldest legal principles of Colonial law was that English settlers carried with them the right to English Law. Keith The First British Empire op cit 182-186. The extent of an Englishman's liberty in a conquered territory, however, became of pressing importance after the conquest of Jamaica in 1655. A crisis developed in 1675 when the Jamaican legislature pressed its legal claims to the full. In 1680 their claims were vindicated as a matter of political expendiency. Keith has noted:

> 'The doctrine thus undoubtedly emerged that the right of the Crown to legislate for a conquered colony disappeared if a representative legislature were conceded. But it was not yet absolutely free from doubt.'

Op cit 13. See also op cit 1; 11-13; & 129-131.

VerLoren Van Themaat 2ed op cit 51-52 observes:

> 'Nou is daar sekere Engelse waarborge van persoonlike vryheid en die onskendbaarheid van liggam, lewe en goed, wat o.a vervat is in die Magna Carta, Petition of Right, Bill of Rights, en die Habeas Corpus wette.

Hierdie waarborge is deel van die Engelse staatsreg en die vraag is of hulle ook deel van die staatsreg van die verowerde land word sodra die inwoners van die gebied onder die Koning se beskerming geplaas word. Aangesien die Engelse in presies dieselfde posisie as die inwoners kom, wil dit voorkom dat dit wel die geval is, aangesien ons nie kon aanneem nie, dat die Engelsman, deur na 'n verowerde gebied te verhuis, daardie beskerming verloor'. (Underling added).

The extent to which South African constitutional law owes its origins to English law, as opposed to Roman-Dutch law, is the subject of much discussion and inconsistent court judgments. VerLoren Van Themaat 2ed op cit 48-62. See also n46 infra.

40. Campbell v Hall 98ER 1045 per Lord Mansfield at 1049-1050. At 1050 Lord Mansfield said:

'We therefore think, that by the two proclamations and the commission ... the King had immediately and irrevocably granted to ... all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council ...'

41. Op cit 1050. Lord Mansfield said with respect to the imposition of taxes:

'... to use the words of Sir Philip Yorke and Sir Clement Wearge, "It can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain." '

42. VerLoren Van Themaat 2ed op cit 49. VerLoren Van Themaat views the annexation as a conquest. He notes that the Crown was not even bound by the Articles of Capitulation, although he argues that they may have some potential value if the legal system is drastically changed. Op cit 52-53; & 59-61. The courts do not appear to make any legal distinctions between a conquered or a ceded territory. Sammut v Strickland [1938] AC 678.

43. For the reasons cited above and in n39 supra.

44. Representative government was introduced at the Cape in 1850 by Letters Patent. Hahlo and Kahn The Union of South Africa - the development of its Laws and Constitution 53-55. Representative government was established in Natal in 1856 by Letters Patent. Hahlo and Kahn op cit 65-66. The Orange River Colony and the Transvaal received both 'representative' and 'responsible' government simultaneously. The Transvaal obtained 'responsible' status by Letters Patent in 1906, and the Orange River Colony obtained the same in 1907. Hahlo and Kahn op cit 110-113.

45. Ch 2 op cit 12 & nn1-6 supra.

46. VerLoren Van Themaat 2ed op cit 51-52; & 59. At 52 he says:

'Na toekenning van 'n wetgewende vergadering bestaan daar nog meer gronde vir die opvatting wat die waarborge soos vervat in die Magna Carta, Bill of Rights ens. deel van die staatsreg van die verowerde gebied word.'

At 59 he declares:

> 'Die meeste bevoegdhede wat gesaguitoefening inhou, is egter gebaseer op die ou gevolgsverhouding (allegiance), of op die Koning se bevoegdhede as deel van die Parlement. Hierdie bevoegdhede word volgens die Engelse reg beoordeel. Eweneens geld die Engelsregtelike beperkings van die gesag van die Koning kragtens Magna Carta, die Petition of Right en die Bill of Rights, binne die Republiek.'
> (Underlining added). A recent report of the Human Sciences Research Council has assumed that the Bill of Rights of 1689 is a part of South African law. RGN - sportondersoek 'Statutêre bepalings wat sport beïnvloed' (deel 1) Verslag van die Werkkommittee : sportwetgewing (No 3) (1982) 60-61.

47. De Smith Constitutional and Administrative Law 286-287. At 286, De Smith notes that some taxes, such as Stamp Duties and Capital Transfer Tax, remain in force until the relevant statute is repealed or amended. The rate of income tax, however, requires annual renewal in the Finance Act. See also Wade and Bradley's Constitutional and Administrative Law 201-202.
48. Income Tax Act No 28 of 1914.
49. Income Tax Act No 22 of 1915 s 1(1):

> 'From and after the first day of July 1915, there shall be charged, levied, and collected for the benefit of the Consolidated Revenue Fund, for the service of the year ending the thirty-first day of March 1916 ... an income tax at the rates and calculated in the manner specified hereunder, in respect of any taxable income'.

50. Income Tax Act No 35 of 1916. See s 1(2).
51. Income Tax (Consolidation) Act No 41 of 1917.
52. Income Tax Act No 40 of 1925.
53. (Underlining added)
54. De Smith Constitutional and Administrative Law 287-288; and Wade and Bradley's Constitutional and Administrative Law op cit 202.
55. Income Tax Act No 58 of 1962.
56. Act No 58 of 1962 s 5(1). The Consolidated Revenue Fund was converted into the State Revenue Fund in 1975. Ch 7 op cit 174 supra.
57. N58 infra.
58. Act No 58 of 1982 s 5(2):

> '...the rates of tax chargeable in respect of taxable income shall be fixed annually by Parliament, but the rates fixed by Parliament in respect of any year of assessment or financial year...shall be deemed to continue in force until the next such determination or variation of rates and shall be applied for the purposes of calculating the tax payable in respect of any such taxable income received by or accrued to or in favour of any person during the next succeeding year of assessment or financial year, as the case may be, if in the opinion of the Commissioner the calculation and collection of the tax chargeable in respect of such

taxable income cannot without risk of loss of revenue be postponed until after the rates for that year have been determined.'

59. N58 supra. Note, in terms of s 5(3) & (6) of Act No 58 of 1962, the Minister of Finance has a limited authority to vary the rates of tax with regard to particular years of assessment by notice in the Gazette.
60. See for example: Income Tax Act No 72 of 1963, and each succeeding Income Tax Act up to and including the Income Tax Act No 94 of 1983. The Income Tax Act of 1963, for example, came into effect on 3rd July 1963. It fixed the rate of tax for any financial years which fell within the dates 1st January 1963 and 31st December 1963.
61. Ch 5 op cit 120 & n30 supra.
62. Keith Dominion Home Rule in Practice 41.
63. Keith Responsible Government in the Dominions [Vol III] 1248-1249.
64. Op cit 1249.
65. Op cit 1258-1261, and Hahlo and Kahn op cit 56-57.
66. Ibid.
67. The Army Act 1881 44 & 45 Victo C 58, s 177:

    'Where any force of volunteers, or of militia, or any other force, is raised...in a colony, any law of...the colony may extend to the officers, non-commissioned officers and men belonging to such force, whether within or without the limits of...the colony...'

    Keith The Constitutional Law of the British Dominions 423.
68. The Army Act of 1881 was made directly applicable to all British colonies by virtue of s 191(1). It read:

    'This Act shall come into force in every place on the day fixed for the commencement in that place of the Regulation of the Forces Act, 1881, and shall continue in force as if a reference to this Act were substituted for the reference to the Army Discipline and Regulation Act, 1879, in the Army Discipline and Regulation (Annual) Act 1881, and that Act shall be construed accordingly.'

    Thus, the Army Act of 1881 applied to the colonies by virtue of the annual Act passed each year by the Imperial Parliament. See further, Army Discipline and Regulation (Annual) Act 1881 44 Victo C 9 s 2(3). In order to ascertain the colonies in which the Army Act of 1881 applied, reference was necessary to the commencement provisions of the Regulation of the Forces Act 1881 44 & 45 Victo c 57. The relevant provision was s 52, which stated:

    'This Act shall come into operation as follows; that is to say

    (a) In the United Kingdom, the Channel Islands, and the Isle of Man...
    (b) Elsewhere in Europe, inclusive of Malta, also in the West Indies and America...
    (c) Elsewhere, whether within or without Her Majesty's dominions, at the expiration of six months after the passing of this Act.'

    See further, n69 infra.

69. After Union in 1910, South Africa was still, technically, a colony. Ch 2 op cit 17-29; and Ch 3 op cit 82-83 & nn304-310 supra. Accordingly, existing Imperial legislation like the Army Act of 1881 would have continued to apply to South Africa after Union. It should be noted that in terms of s 1 of the Colonial Laws Validity Act 1865 28 & 29 Victo C 63 it was not necessary for Imperial legislation to refer expressly to particular colonies - as long as the intention of Parliament could be inferred. S 1 said:

> 'An Act of Parliament or any provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express words or necessary intendment of any Act of Parliament.'

See further, Wheare The Constitutional Structure of the Commonwealth 22. That the Army Act of 1881 was universally applicable to all British colonies can be seen from the wording of the definitions clause in s 190 of the 1881 Act. S 190 defined the word 'colony' in all-embracing terms to include:

> '...for the purposes of this Act Cyprus and any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and the Isle of Man, and India...'

70. Ch 7 op cit 179 & n46 supra. VerLoren Van Themaat's opinion was confirmed by a recent Human Science Research Council Report. See n46 supra.
71. Keith The First British Empire op cit 183; and n 39 supra.
72. Ibid; and Sammut v Strickland [1938] AC 678 per Lord Maugham LC at 701. Statutes would apply to the extent that they were of general application and not limited to English conditions. Keith The First British Empire op cit 183-184; & 186.
73. Keith The First British Empire op cit 183-184; & 186. This was the Common Law position, prior to the enactment of the Colonial Laws Validity Act 1865 28 & 29 Victo C 63.
74. VerLoren Van Themaat 2ed op cit 49; 59-62.
75. Op cit 54-59.
76. Op cit 62.
77. Ch 7 op cit 177-179 supra.
78. Campbell v Hall 98 ER 1045 per Lord Mansfield at 1048.
79. Keith The First British Empire op cit 17.
80. Where a representative colonial legislature was already in existence, the subsequent incorporation of the Bill of Rights would mean that control of locally raised armed forces would vest in the local legislature. It was fear of this eventuality which led the Imperial authorities to resist incorporation of the Bill of Rights in the North American colonies. Keith The First British Empire op cit 184-185. The North American colonies did not enjoy the benefits of the Bill of Rights because they were settled prior to its enactment.
81. Ch 7 op cit 178 & nn40-41 supra.
82. Campbell v Hall 98 ER 1045 per Lord Mansfield at 1050:

> 'We therefore think, that by the two proclamations and

> the commission ... the King had immediately and irrevocable granted to all ... whom it might concern, that the subordinate legislation over the island should be exercised by an assembly ... in like manner as the other islands belonging to the King'.

(Underlining added). See further Keith The First British Empire op cit 14-17. cf Sammut v Strickland [1938] AC 678 per Lord Maugham LC at 704; & 706-707. At 704 Lord Maugham LC said:

> 'It seems to their Lordships that this case in no way tends to support the respondent's present contention; and, with all respect to the Court of Appeal, they are unable to agree with their statement that it is an established constitutional principle based on Campbell v Hall that the grant of representative institutions once made, the Crown is immediately and irrevocably deprived of its right to legislate by Letters-Patent or Orders in Council, unless there is an express reservation to that effect. The true proposition is that, as a general rule, such a grant without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist.'

(Underlining added). In both Campbell v Hall, and in Sammut v Strickland, the grant of representative institutions had involved the exercise of prerogative powers. The Parliament of the Union of South Africa, however, was created by statute. What difference, if any, this made, needs further investigation.

83. N80 supra. The Imperial Parliament still had unfettered legislative power to apply any statute to any colony in relation to any subject-matter. Ch 2 op cit 20-21 & nn53-54 supra.

84. The prerogative was carried as it stood when the colonies first received English law. Keith The First British Empire op cit 185. Accordingly, a colony which was settled after 1688 would obtain the Royal Prerogative in its truncated, post-1688 form. See further Ch 7 op cit 184-186 & nn71-72 supra.

85. Keith The Constitutional Law of the British Dominions 414-415. At 415 he said:

> 'The keeping of a standing army of any kind in the Dominions is no doubt illegal unless approved by statute, and the present forces are all so regulated.'

Keith has therefore retracted an earlier assertion that the Royal Prerogative could be used to raise troops in the Dominions. Keith Responsible Government in the Dominions [Vol III] 1248 n1. The Imperial Parliament could enact the necessary legislation. N83 supra. This would have defeated the whole purpose of colonial self-government, however.

86. Ch 2 op cit 17-21; & 23-24 supra.

87. Ch 2 op cit 23-24 supra.

88. Hahlo and Kahn op cit 150-151.

89. The Report of the Conference on the operation of Dominion Legislation and Merchant Shipping Legislation 1929,

paragraphs 37 & 38, quoted in VerLoren Van Themaat 2ed op cit 568. The conflicting court opinions have been noted by VerLoren Van Themaat. Op cit 206-207.

90. N67 supra.

91. Defence Act No 13 of 1912.

92. (Underlining added). See further, Keith Dominion Home Rule in Practice 41-42.

93. Dicey op cit 295 n1; and Keith The Dominion as Sovereign States 628.

94. A mere amendment of s 59 of the South Africa Act of 1909 would not have settled the question whether or not the limitation was an inherent, constitutional one.

95. Ch 7 op cit 184 & n67 supra.

96. Ch 7 op cit 184 & n68 supra.

97. (Underlining added).

98. When South African legislation extended the application of an Imperial statute to the Union, this did not necessarily mean that the statute became incorporated into South African law. As far as the Army Act of 1881 is concerned, it is submitted that it was extended to South Africa to operate as an Imperial Act and not as a South African one. For the reasons, see n101 infra.

99. The full provision of the Army Act of 1881 s 177 was as follows:

> 'Where any force of volunteers, or of militia, or any other force is raised ... in a colony ... any law of ... the colony may extend to the officers, non-commissioned officers and men belonging to such force, whether within or without the limits of ... the colony; and where any such force is serving with part of Her Majesty's regular forces, then so far as the law of ... the colony has not provided for the government and discipline of such force, this Act and any other Act for the time being amending the same shall, subject to such exceptions and modifications as may be specified in the general orders of the general officer commanding Her Majesty's forces with which such force is serving, apply to the officers, non-commissioned officers, and men of such force, in like manner as they apply to the officers, non-commissioned officers, and men respectively mentioned in the two preceding sections of this Act.'

(Underlining added). See further, Keith Dominion Home Rule in Practice 41-42.

100. N68 supra.

101. It is clear that the Code would have lost the capacity to have extra-territorial effect. There was also the possibility, however, that the Code would have lost its validity within the borders of South Africa as well. This can be asserted, because the Union Military Discipline Code was derived from an Imperial Statute, and not a South African one. See further, Copyright Owners Reproduction Society Ltd v EMI (Australia) (Pty) Ltd 100 CLR 597 per Dixon CJ at 603-604.

102. The Statute of Westminster, 1931 22 Geo V C 4 s 3:

'It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.'

103. Defence Act (Amendment) and Dominion Forces Act No 32 of 1932.

104. The Defence Act No 13 of 1912 s 123 was thus amended by s 4 of the 1932 Act to read as follows:

'This Act shall extend to all members of the Defence Forces of the Union whether serving within or outside the Union'.

See further, Ch 7 op cit 189-190 supra.

105. S 5 of the Defence Act (Amendment) Act and Dominion Forces Act No 32 of 1932 deleted the definition of the term 'Army Act' in the Defence Act of 1912. S 5 of the 1932 Act declared:

'Section one hundred and twenty-four of the principal Act is hereby amended by the deletion of the definition of the expression "Army Act".'

See further, Ch 7 op cit 190 supra.

106. Ch 3 op cit 49-50 & 82-83 supra.

107. Statute of Westminster, 1931, 22 Geo V C 4 s 4:

'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of the Dominion unless it is expressly declared in that Act that the Dominion has requested and consented to, the enactment thereof.'

Keith The Dominions as Sovereign States 91. It should be remembered, however, that s 4 of the Statute of Westminster conflicts with s 2 of the Status of the Union Act No 69 of 1934. See Ch 3 op cit supra. In 1955 the British Parliament repealed the Army Act of 1881, and replaced it with the Army Act of 1955. Ch 5 op cit 120 & n30 supra. The new Act was careful not to prejudice the legal position of armed forces in any of the Dominions. The Army Act 1955 3 & 4 Eliz 2.C 18 s 206 declared:

'Members of a naval, military or air force being a Commonwealth force are subject to military law to such extent and subject to such adaptions and modifications, as may be provided by or under any enactment relating to the attachment of members of such forces.'

In s 225 of the Act, the term 'Commonwealth force' was defined as follows:

'... any of the naval, military or air forces of Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, India, Pakistan or Ceylon.'

From a British perspective, ss 206 & 225 of the 1955 Act preserved the enabling provision in s 177 of the Army Act of 1881. From the perspective of the Commonwealth countries concerned, however, the 'saving' clauses were unnecessary. See Copyright Owners Reproduction Society Ltd v EMI (Australia) Ltd (1958) 100 CLR 597 per Dixon CJ at 604.

108. Defence Act No 44 of 1957.

109. Swift MacNeil The Constitutional and Parliamentary History of Ireland Till Union 170. In 1780, as the movement towards

Irish legislative independence gained momentum, moves were made to enact a Mutiny Bill - on the grounds that the Mutiny Bill of the British Parliament did not extend to Ireland. A Mutiny Bill was eventually approved, but alterations were made to it by the Privy Council. These alterations were accepted by the Irish Parliament, and thus the Perpetual Mutiny Act was created. The government of the Army in Ireland was thus placed beyond Parliamentary control. Eventually, the King; it was announced, was prepared to accept the limitation of the Mutiny Act to two years. Swift MacNeil op cit 166-167; 168-170, 173-174; & 183. Ireland had been carefully excluded from the chief benefits of the 1688 Revolution. An Irish Bill of Rights was sent to England in the first Irish Parliament after the Revolution - but never returned. In fact, Ireland never had a Bill of Rights. Op cit 68-69.

110. Keith The First British Empire op cit 184-185.
111. Op cit 216-220.
112. Op cit 216.
113. Ch 6 op cit 145-146 supra.
114. Op cit 146-147 supra.
115. General Loans Act No 17 of 1911.
116. Public Works Loan and Floating Debt Consolidation Act No 29 of 1911.
117. Act No 29 of 1911 s 2:

> 'The Governor-General is hereby authorized to exercise the powers to raise moneys on loans which were granted by the late legislatures of the Cape of Good Hope, Natal, and the Orange River Colony, and which were not exercised at the thirtieth day of May 1910, amounting to four million five hundred and thirty thousand seven hundred and forty-nine pounds, five shillings and seven pence sterling as set out in the Second Schedule to this Act. The Governor-General shall exercise such borrowing powers in accordance with the provisions of the General Loans Act, 1911.'

Note: s 8 of the Act entitled the Governor-General to borrow two million pounds in anticipation of any loans authorized in terms of the Act. Such temporary borrowings, however, had to be repaid out of the principal sums raised under the Act.

118. Ch 7 op cit 172 supra.
119. Ibid.
120. S 117 of the South Africa Act does not explain the difference between revenues 'raised' and revenues 'received'. It is submitted, however, that to 'raise' money meant 'to borrow' money. In the subsequent General Loans Act of 1911, authority to borrow money was granted in s 1 in terms of authority 'to raise' money. Ch 7 op cit 198 supra. Note, the South Africa Act had anticipated that the government might wish to borrow money. S 124 of the 1909 Act authorized the Union to 'renew' loans which had been raised, originally, by the four constituent colonies of South Africa. S 124 declared:

> 'The Union shall assume all debts and liabilities of

the Colonies existing as its establisment...and may...convert, renew or consolidate such debts.'

It must be remembered that although the two 1911 Acts gave authority to the 'Governor-General' to borrow money, the term 'Governor-General' meant the 'Governor-General acting by and with the advice of the Executive Council'. See the Interpretation Act No 5 of 1910 s 3. In practice, therefore, no distinction existed between revenues 'raised' by the Governor-General, and revenues 'raised' by the Governor-General-in-Council.

121. Exchequer and Audit Act No 21 of 1911.

122. Act No 21 of 1911 s 3:

' "revenues" shall mean all taxes...and other receipts of the Crown in its Government of the Union, from whatever source arising... "revenues" shall further include the proceeds of all loans raised.'

123. Act No 21 of 1911 s 23(1)

'The Commissioner for Customs and Excise, the Commissioner for Inland Revenue, and the Postmaster-General shall each...cause the gross revenues of his department to be paid daily into the Exchequer Account. All other revenues shall be paid into the Exchequer Account.'

124. Act No 21 of 1911 s 3:

' "Exchequer Account" shall mean the account of the Exchequer of the Union of South Africa...and shall include the account of the Consolidated Revenue Fund...'

Presumably, the proceeds from loans which had been raised went straight into the loan account of the Consolidated Revenue Fund. Kennedy & Schlosberg op cit 156.

125. General Loans Consolidation and Amendment Act No 22 of 1917.

126. Act No 22 of 1917 s 1:

'Whenever any Loan Appropriation Act or Appropriation (Part) Act has been passed by Parliament, the Governor-General is hereby authorized to borrow such sums as may, in addition to the amount at the credit of or accruing to the loan account, be required to defray the loan expenditure sanctioned by such Appropriation Act or Appropriation (Part) Act.'

127. Act No 22 of 1917 s 2:

'In addition to any sum which the Governor-General may be authorized to borrow under section one, the Governor-General is also hereby authorized to borrow from time to time such sums as he may deem desirable : Provided that the amount borrowed under this section shall not exceed three million pounds at any one time. No expenditure out of any sum borrowed under this section shall be incurred unless such expenditure is authorized by a Loan Appropriation Act.'

128. Ibid.

129. General Loans Act No 16 of 1961.

130. Act No 16 of 1961 s 3(1).

'The Governor-General may, in addition to any sum which may be borrowed under section two, from time to time

borrow such sums, not exceeding at any one time thirty million rand, as he may deem desirable.'

131. Act No 16 of 1961 s 3 (2):

'No expenditure out of any sum borrowed under subsection (1) shall be incurred unless such expenditure is authorized by an Appropriation Act.'

132. Exchequer and Audit Act No 66 of 1975.

133. The Act has been amended seventeen times between 1976 and 1986. It should be remembered that no account is taken in this chapter of legislative changes which have occurred since 1983.

134. Act No 66 of 1975 s 2(1):

'The Treasury shall, in respect of the State Revenue Fund, keep in its books a State Revenue Account which shall...be credited with all revenue...and from which shall be defrayed all expenditure...'

This was the wording of the provision just prior to its amendment by the Exchequer and Audit Amendment Act No 100 of 1984. Note, Revenue 'accruing to the Railway and Harbour Fund, the Post Office Fund, or a Provincial Revenue Fund was not included in the Act's definition of the term 'revenue'.

135. Act No 66 of 1975 s 1(1). This aspect of the definition of 'revenue' has not been altered by amending legislation.

136. Act No 66 of 1975 s 4(1):

'The moneys in the State Revenue Fund shall be appropriated by Parliament by an Appropriation or other Act for the requirements of the State...'

This was the provision prior to its amendment by the Exchequer and Audit Amendment Act No 100 of 1984.

137. Act No 66 of 1975 s 16(1):

'The Minister may at any time borrow money to

(a) finance anticipated deficits in the Exchequer Account;
(b) obtain foreign currency
(c) maintain such credit balance in the Exchequer Account as he may deem necessary in the public interest.'

No financial limits or ceiling appear in this or any related provision. The 'Minister' being referred to was the Minister of Finance. See s 1 of the 1975 Act. S 16(1) was subsequently amended in 1984. S 17 of the 1975 Act also gave the Minister a power to borrow unlimited sums, in the following terms:

'The Minister may, in addition to any sums which he may borrow under section 16, borrow such further amounts as he, after consultation with the bank, may deem to be necessary for the proper regulation of internal monetary conditions'.

This provision was subsequently amended in 1984.

138. Expenditure defrayed from moneys raised in terms of s 16 would ultimately have to come out of the State Revenue Account. Money's raised in terms of s 17 are placed in a separate stabilization account. See s 18(1). Any expenditure or losses incurred on the Stabilization Account, however, would have to be appropriated by Parliament from the State Revenue Account. See s 18(4)(a) which said:

'Any expenditure incurred, loss suffered or profit

earned...in the management of the Stabilization Account, shall be on account of the State Revenue Account : Provided that any such loss or expenditure shall be defrayed from moneys appropriated by Parliament for the purpose'.

139. It should be noted that in terms of s 12(1) of the South African Transport Services Finances and Accounts Act No 17 of 1983, the General Manager of South African Transport Services is entitled to borrow money with Ministerial approval. S 12(3) declares that the repayment of such loans does not require appropriation by Act of Parliament.
140. Vorster in Jacobs (ed) 'n Nuwe Grondwetlike Bedeling vir Suid-Afrika 180. See further, op cit 182.
141 Giliomee The Parting of the Ways 99-100.
142. Giliomee in The Rise and Crisis of Afrikaner Power 196-197; 216 & 255.
143. In the period between 1948 and 1977, the National Party steadily increased its parliamentary representation. Giliomee in Afrikaner Power op cit 206. The 1981 election results, however, indicated that a shift away from support for the government had taken place in the electorate. Giliomee The Parting op cit XVI-XVII; & 113. Boulle has said that the absence of the alteration-in-power phenomenon has meant that South Africa has become noticeably deviant from the norm of Westminster political practice. South Africa and the Consociational Option - a constitutional analysis 148.
144. Giliomee The Parting op cit XIII; 21-22; 35; 37; 38-39; 52-53; & 159. Giliomee has said that by the end of 1979, the National Party was shedding its image as a coalition of class elements within the Afrikaner community. It began to rid itself of its working-class constituency, and align more clearly with sections of the business community. The trend has been towards the creation of a Bourgeois party and government. Given that the great majority of Afrikaner people have acquired Bourgeois or petty Bourgeois status and values, this transformation has been possible.
145. Giliomee 'Adopted Stategies for the maintenance of White rule' Conference on Economic Development and Racial Domination (University of the Western Cape) (Paper No 36) (October 1984) 6.
146. Op cit 29.
147. Adam in Afrikaner Power op cit 69-70.
148. The absence of the 'alternation-in-power' phenomenon precedes the electoral victory of the National Party in 1948. The only other occasion on which the ruling party decisively lost an election was in 1924. See Ch 3 op cit 47-48 supra.
149. Some of the conventions which governed the relationship between the House of Commons and the House of Lords were superceded by statute. The conventions were defined more sharply, and 'enacted' in the Parliament Act of 1911. Wade and Bradley's Constitutional and Administrative Law op cit 190-191.
150. VerLoren Van Themaat 3ed op cit 185. The South Africa Act

of 1909 s 60 declared:

60(1) 'Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly...'

(2) 'The Senate may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government.'

(3) 'The Senate may not amend any Bills so as to increase any proposed charges or burden on the people.'

The wording of s 60 of the Republic of South Africa Constitution Act No 32 of 1961 was almost identical. It should be remembered that the Senate was abolished in 1980 by the Republic of South Africa Constitution Fifth Amendment Act No 101 of 1980.

151. VerLoren Van Themaat 3ed op cit 185. In terms of s 63 of the South Africa Act of 1909, if there was legislative deadlock between the two Houses of Parliament over a Bill in two successive sessions, the Governor-General could convene a joint sitting of both Houses where the deadlock would be resolved by majority vote of members present. Whenever the Senate rejected an Appropriation Bill, however, the convening of a joint session of both Houses could take place immediately. S 63 was repealed and replaced with a substantially different provision in terms of s 7 of the Senate Act No 53 of 1955. The new provision was subsequently re-enacted as s 63 of the Republic of South Africa Constitution Act No 32 of 1961. The new deadlock provision established that if the Senate rejected a Bill which imposed taxation or a Bill which appropriated revenues, the version which had been passed by the House of Assembly could be presented at once to the Governor-General or the State President for his assent. As far as other Bills were concerned, if there was deadlock between the two Houses over two successive sessions, the Bill as passed by the House of Assembly would be presented to the Governor-General or State President for his assent. Note; the Senate was abolished in 1980. N150 supra.

152. South Africa Act of 1909 s14:

'...After the first general election of members of the House of Assembly...no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament'.

The Republic of South Africa Constitution Act No 32 of 1961 s 20(3) declared much to the same effect:

'No Minister shall hold office for a longer period than three months unless he is or becomes a member of the Senate or the House of Assembly.'

The period of grace was extended from three months to twelve months by the Republic of South Africa Constitution Amendment Act No 70 of 1980 s 1. Reference to the Senate was deleted when the Senate was abolished soon afterwards. N150 supra. VerLoren van Themaat does not mention this particular rule when he examines the important South African conventions. Its conventional origin, however, may be traced in the equivalent British Constitutional rule. Ch 1

op cit 3 & n20 supra.

153. Jennings Cabinet Government 13-19; and Dicey op cit 429-432; 454-455; & 457.

154. Note, the 'democratic' character of the South African constitution has always been undermined by the absence of universal adult suffrage. Ch 1 op cit 10 & n58 supra. This has meant that the South African constitution has never properly conformed to the fourth characteristic of a Westminster system, namely, that Ministers are responsible to 'a freely elected and representative' legislature. Ch 1 op cit 2 & n9 supra.

155. Complete control of financial legislation and the final say over all other legislative matters had to be given to the House of Assembly if the will of the electorate's directly elected representatives was to prevail in South Africa's constitutional system. The requirement that Ministers become members of the legislature rests at the foundation of the convention of collective and individual ministerial responsibility. It is upon this basis that the whole notion of responsible government has been built. Ch 2 op cit 12 & n6; and Ch 3 op cit 46-48 & n118 supra.

156. It cannot be assumed that the courts would be willing to enforce obedience to such rules. See the discussion on leges imperfectae. Ch 7 op cit 207-210 infra. See also VerLoren Van Themaat 3ed op cit 175 & n77; and VerLoren Van Themaat 'Konvensie En Reg' 1942 (6) THR-HR 94-95.

157. Dean 'A New Constitution for South Africa?' (1984) Jahrbuch Des Öffentlichen Rechts Der Gegenwart 460 at 477 says:

> '...part of political reality is the White electorate's familiarity with and belief in the democratic character of the existing conventions. Flouting these conventions will expose the President to the risk of losing political support amongst those on whom he will depend for his continuation in office.'

The term 'South African Prime Minister' could be substituted for Dean's reference to 'the President'. In South Africa, the term 'White'is legally defined. N243 infra.

158. In terms of clause 26(3) of the Republic of South Africa Constitution Bill (B.91-'83) as read a first and second time, the parliamentary basis of government was to be watered down. The clause did not require Ministers to become members of the legislature within a specified time of their appointment to Ministerial office. An attempt to reinstate the full rigours of the rule which required Ministers to become members of the legislature was defeated in Select Committee. Second Report of the Select Committee on the Constitution (on the Republic of South Africa Constitution Bill) (SC 8B-'83) Part I 130 & 134. All the Ministers who sat on the Select Committee supported the watering-down of the principle of a parliamentary executive. These Ministers were the Ministers of Constitutional Development and Planning, of Co-operation and Development, of Internal Affairs, of National Education, and of Justice. The Bill was finally enacted as the Republic of South Africa Constitution Act No 110 of 1983. The rule requiring a parliamentary-based executive had been

reinstated, however. The rule was stated clearly in ss 24(3)(a) and 27(2)(a) of the 1983 Act. The apparent 'volte-face' by the government has not been explained. Perhaps the resistance to the watering-down of parliamentary government was too strong among National Party members of Parliament. This matter requires further investigation.

159. Ch 3 op cit 32-52 supra.
160. Ch 3 op cit 99-100 supra.
161 Status of the Union Act No 69 of 1934.
162. Ch 3 infra. Certain powers of the Governor-General were excepted from the operation of s 4(1) & (2) of the Status of the Union Act No 69 of 1934. Ch 7 op cit 211-213 infra.
163. Royal Executive Functions and Seals Act No 70 of 1934.
164. Ch 3 op cit 93-94 & nn382-382 supra.
165. Ch 3 op cit 93-94 & nn378-381 supra.
166. There is no known example of an instrument signed by the Governor-General which has failed to comply with the procedural requirements for co-signature. The provisions of the 1961 Constitution Act which used to regulate co-signature requirements, however, have been the subject of much academic debate. VerLoren Van Themaat 2ed op cit 269-270. There is now clear authority for the proposition that a proclamation issued by the State President can be declared null and void if it fails to comply with statutory procedural requirements. Government of South Africa and another v Government of KwaZulu and another 1983 (1) SA 164 SA (AD) per Rabie CJ at 198; 199; & 200-201. A court of law might well have adopted similar reasoning with respect to a proclamation by the Governor-General.
167. Ch 1 op cit 2-6 & n9; Ch 2 op cit 12 & n6; & Ch 3 op cit 32-52 supra.
168. Republic of South Africa Constitution Act No 32 of 1961 s 16(1) & (2):

> 16(1) 'The executive government of the Republic in regard to any aspect of its domestic or foreign affairs is vested in the State President, acting on the advice of the Executive Council'.
>
> (2) 'Save where otherwise expressly stated or necessarily implied, any reference in this Act to the State President shall be deemed to be a reference to the State President acting on the advice of the Executive Council.'

169. Act No 32 of 1961 s 19(1).:

> 'The will and pleasure of the State President as head of the executive government of the Republic shall be expressed in writing under his signature, and every instrument signed by him shall be countersigned by a Minister.'

Note, the provisions governing custody of the Seals were different under the 1961 Constitution Act. The Prime Minister of the Union had enjoyed possession of the Seals under s 3 of the Royal Executive Functions and Seals Act No 70 of 1934. See Ch 3 op cit 93 & n 379 supra. In terms of s 18(2) of the Republic of South Africa Constitution Act No 32 of 1961, the seal of the Republic was placed in the custody

of the State President. The State President was thus able to confirm his own signature with the seal which was in his possession.

170. VerLoren Van Themaat 2ed op cit 269-270. At 270 he says:

> 'Feit is egter dat as die Minister weier om te onderteken (of as daar geen Minister is om te onderteken nie), kan die Staatspresident nie besluit nie omdat hy nie sy besluit te kenne kan gee nie.'

See further Ch 7 op cit 212-213 & n196 infra.

171 Republic of South Africa Constitution Act No 32 of 1961 s 10(1)(b):

> 'He shall cease to hold office on a resolution passed by the Senate and by the House of Assembly during the same session declaring him to be removed from office on the ground of misconduct or inability to perform efficiently the duties of his office.'

See further, VerLoren Van Themaat 3ed op cit 227; & 230-231. The Senate was abolished in 1980. N150 supra.

172. VerLoren Van Themaat 3ed op cit 180 n97; & 227. At 180 n97 he says:

> 'In Suid-Afrika is daar met die ampsaanvaarding van mnr Vorster as staatpresident in 1978 nogal gespekuleer dat hy 'n aktiewer rol sal speel as sy voorgangers dog het dit gou geblyk dat net soos die britse monarg, hy buite die politieke arena gestaan het.'

173. See, for example, Schierhout v Union Government 1927 AD 94 per De Villiers JA at 100; & Gardiner AJA at 107. See also Deitch v Smuts NO and Others 1939 TPD 58 per Greenberg JP at 62-64. At 63 he said:

> 'In the present case the Minute shows that an undefined number of Ministers, whose number however was sufficient to warrant the signature of the Minute by the Prime Minister, recommended the Governor-General to approve of the appointment. In my opinion this language is clearly patient of the meaning that a number of Ministers, including the Prime Minister, were advising the Governor-General to make the appointment. These Ministers may well constitute the Executive Council and if they do, then their recommendation, approved by the Governor-General, would amount to an appointment by the Governor-General-in-Council in terms of sec. 100.'

This passage is remarkable for the vague terms in which it describes the decision-making process of the Governor-General-in-Council. The court took no account of the individual views of each Minister who was present at the meeting. The court took no account of the number of Ministers who were in favour of or against the ultimate decision which was reached at the meeting. The presence or absence of a systematic voting procedure when decisions were being made by Ministers of State did not seem to concern the court at all.

174. Ch 3 op cit 32-34 supra.

175. Ch 3 op cit 36 & nn29 & 31 supra.

176. The wording of s4(1) and (2) of the Status of the Union Act No 69 of 1934, whereby the King and the Governor-General were

obliged to act on the advice of the Ministers of State for the Union was subject to a proviso in s 4(3). S 4(3) declared:

> 'The provisions of sub-sections (1) and (2) shall not be taken to affect the provisions of sections twelve, fourteen, twenty and forty-five of the South Africa Act and the constitutional conventions relating to the exercise of his functions by the Governor-General under the said sections'.

The wording of s 4(1) and (2) of the Royal Executive Functions and Seals Act No 70 of 1934, whereby the King's sign manual had to be confirmed by one of the Seals of the Union, and accompanied by a Ministeral co-signature, was subject to a proviso in s 4(4). S 4(4) said:

> 'The provisions of this section shall not affect the exercise of the powers under sections twelve, fourteen, twenty and forty-five of the South Africa Act, 1909, by the King or the Governor-General.'

It is clear, therefore, that the provisos in the two 1934 Acts corresponded with each other. Ss 12; 14; 20; and 45 of the South Africa Act of 1909 are set out in nn 177-179 infra.

177. South Africa Act of 1909 s12:

> 'There shall be an Executive Council...and the members of the council shall be chosen and summoned by the Governor-General...and shall hold office during his pleasure.'

178. South Africa Act of 1909 s 14:

> 'The Governor-General may appoint officers...to administer such departments of State of the Union as the Governor-General-in-Council may establish; such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the Kings' Ministers of State for the Union.'

179. South Africa Act of 1909 s 20:

> 'The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone...'

S 45 declared:

> 'Every House of Assembly shall continue for five years from the first meeting thereof, and no longer, but may be sooner dissolved by the Governor-General.'

180. Ch 3 op cit 32-40; 42-45; & 53-82 supra.
181. Ch 3 op cit 34-39 supra.
182. Ch 7 op cit 172-176 supra.
183. Ch 3 op cit 64-82 supra.
184. Under the Westminster system, the effective head of government is the Prime Minister. Ch 1 op cit 2 & n9 supra. The Prime Minister must be the Premier in substance as well as form, however. Ch 3 op cit 72-73 & 80-81 supra.
185. The wording of s 16(1) and (2) of the Republic of South Africa Constitution Act No 32 of 1961, whereby the State President

was obliged to act on the advice of the Executive Council, was subject to a proviso in s 16(3). S 16(3) declared:

> 'The provisions of sub-sections (1) and (2) of this section shall not be construed to affect the exercise by the State President of his powers under section twenty, in so far as it relates to the appointment of Ministers, or section twenty-five, paragraph (a) of sub-section (1) of section thirty-three or section forty-seven, or the constitutional conventions relating to the exercise of his functions by the State President.'

It is interesting to note that the dismissal of Ministers was not subject to the proviso. Accordingly, the State President could only dismiss Ministers if he was advised to do so by his existing Ministers of State. VerLoren Van Themaat 3ed op cit 179-180 & n95. Note, however, it has been argued by VerLoren Van Themaat that a 'reserve power' to dismiss Ministers without advice has remained intact. N195 infra. S 16(3) of the 1961 Constitution Act was thus remarkably similar to s 4(3) of the Status of the Union Act No 69 of 1934. See n176 supra. The one difference was that s16(3) of the 1961 Act did not permit the State President to dismiss Ministers without advice. Note, ss20; 25; 33(1)(a); and 47 of the 1961 Act are set out in nn186-187 infra.

186. Republic of South Africa Constitution Act No 32 of 1961 s 20(1) declared:

> 'The State President may appoint persons...to administer such departments of State of the Republic as the State President may establish.'

187. Republic of South Africa Constitution Act No 32 of 1961 s 25 declared:

> (1) 'The State President may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time, by proclamation in the Gazette or otherwise, prorogue Parliament.'

S 33(1) declared:

> 'Notwithstanding anything contained in this Act or any other law the State President may:
> (a) at any time by proclamation in the Gazette dissolve the Senate simultaneously with the House of Assembly;...'

S 47(1) declared:

> 'Every House of Assembly shall continue for five years from the first meeting thereof, and no longer, but may at any time be dissolved by the State President by proclamation in the Gazette.'

188. VerLoren Van Themaat 3ed op cit 179-182. Whether or not the Prime Minister could advise a dissolution without first consulting his colleagues is rather unclear.

189. Kahn (1961) Annual Survey of South African Law 1-2; and Basson Verteenwoordiging in die Staatsreg 309-311.

190. Kahn (1961) Annual Survey op cit 5-6; and Kahn The New Constitution 20-21. See further, Prime Minister Verwoerd, House of Assembly Debates 103 (1960) 20th January Cols 101-103.

191. Kahn (1961) Annual Survey op cit 1; and Kahn The New

Constitution 1 & 23.

192. Olivier in De Crespigny and Schire (eds) The Government and Politics of South Africa 20.

193. Ibid; and Roux in Worral (ed) South Africa: Government and Politics 46-47.

194. South African Prime Ministers have ruled in the tradition of 'Volksleiers'. Olivier in De Crespigny and Schire (eds) The Government and Politics of South Africa 26. This placed the South African Prime Minister and his colleagues in an exceptionally strong position. Controversial policies, such as a departure from existing cosntitutional norms could be justified in the name of group security. Adam Afrikaner Power op cit 22; 67-70; & 133. Accordingly, when the South African Prime Minister proposed to abandon the traditional form of Westminster government in 1982, he justified the need for change in terms of 'anti-communism', the defence of 'civilized standards', and the promotion of greater 'security' for Whites. Address by the Hon. P W Botha, the Prime Minister, to the National Party Federal Congress at Bloemfontein (30th-31st July 1982). The address is reproduced in The Second Report of the Constitutional Committee of the President's Council (PC.4/1982) 105-107; 110-111; & 113-114. The strength of the traditional political leadership was unable to prevent a limited split in the National Party, however. Giliomee The Parting op cit XVI-XVIII.

195. The possible exercise of a 'reserve power' by the Sovereign has been acknowledged in the United Kingdom. Ch 3 op cit 55-58 supra. Sir Patrick Duncan's refusal to grant a dissolution to General Hertzog may be regarded as an example of the use of 'reserve powers' in South Africa. Ch 3 op cit 72-82 supra. VerLoren Van Themaat has argued that there may have been circumstances in which the State President would have been entitled to use 'reserve powers' to dismiss Ministers, and appoint new ones, or dissolve Parliament. VerLoren Van Themaat 3ed op cit 180-181; 233-234; & 235.

196. Although s 16(3) of the Republic of South Africa Constitution Act No 32 of 1961 had permitted the State President to exercise certain powers without Ministerial advice, the exercise of these powers did not appear to have been excluded from the Ministerial co-signature requirements of s 19(1). S 19(1) declared:

> 'The will and pleasure of the State President as head of the executive government of the Republic shall be expressed in writing under his signature, and every instrument signed by him shall be countersigned by a Minister.'

S 19(1) of the 1961 Act did not, therefore, reflect the proviso which had been contained in s 4(4) of the Royal Executive Functions and Seals Act No 70 of 1934. See n 176 supra. VerLoren Van Themaat has reviewed the problem in detail. VerLoren Van Themaat 3ed op cit 235-236. He argued that Ministerial co-signature was not necessary for powers exercised under s 16(3) of the 1961 Constitution Act. At 235, one of his arguments went as follows:

'Die voor-die-hand-liggende is dat artikel 19 'n leemte het en dat die uitsonderings van artikel 16(3) ook in die artikel vervat moes gewees het'.

At 236 he has argued:

'Indien aanvaar word dat die mede-ondertekening deur 'n minister impliseer dat die staatspresident deur die uitvoerende raad geadviseer is, is dit 'n noodwendige gevolgtrekking dat die staatspresident se uitvoerende handelinge wat hy op sy eie, kragtens artikel 16(3) verrig, nie mede-onderteken hoef te word nie. So 'n oplossing sou ook in ooreenstemming met die voorafgaande staatsregtelike reëling wees.'

Kahn has argued that the draftsmen of the 1961 Constitution Act made an ill-advised effort to restrict the powers of the Head of State. Kahn (1961) Annual Survey op cit 7. Schmidt has argued, however, that the co-signature requirements could not be overlooked. Nonetheless, he believed that the co-signature requirements did not prejudice the State President's right to exercise powers without advice under s 16(3) of the 1961 Act. He said:

'Artikel 16 bepaal naamlik wie die besluit moet neem, d.w.s. òf die uitvoerende raad òf die Staatspresident, terwyl artikel 19 net bepaal hoe so 'n besluit te kenne gegee moet word. Artikel 19 dwing dus sowel die Staatspresident as die betrokke minister om 'n stuk te onderteken wat uitvoering gee aan 'n besluit geneem òf deur die Staatspresident òf deur die Uitvoerende Raad. Nòg die een nòg die ander kon weier om te onderteken, sonder om die reg van die land te skend'.

Schmidt 'Die Grondwet van die Republiek van Suid-Afrika, Wet No 32 van 1961' (1962) 25-26 THR-HR 40-41.

VerLoren Van Themaat, Kahn and Schmidt thus had quite different perspectives on the effect of s 19(1). The courts were never presented with the opportunity to settle the controversy.

197. VerLoren Van Themaat 3ed op cit 180-182.
198. Ch 7 op cit 202-204 supra.
199. Giliomee Afrikaner Power op cit 197-201; & 205-206.
200. VerLoren Van Themaat 3ed op cit 182-183.
201. Op cit 183.
202. Ibid.
203. It has been noted that the White population is attached to the traditions of 'democratic' government. N157 supra. The ethnic basis of parliamentary politics, however, has meant that controversial decisions can be justified on the basis of group security. N194 supra.
204. Dicey op cit 44-48.
205. VerLoren Van Themaat 3ed op cit 183.
206. Ch 3 op cit 48-52 supra.
207. A modern description of collective responsibility in the United Kingdom may be found in Wade and Bradley's Constitutional and Administrative Law op cit 107-111. At 111 Wade and Bradley say:

'It is evident that collective responsibility is invoked to control the behaviour of ministers while

they are in office and that this control is exercised by the Prime Minister. To this extent, the consequences of collective responsibility appear to be what the Prime Minister of the day chooses to make them.'

See also MacIntosh The British Cabinet 531-536; and Johnson In Search of the Constitution : reflections on State and Society in Britain 83-85.

The vagueness of the rule in a South African context will become apparent in the text infra.

208. Booysen and Van Wyk Die '83 Grondwet 119.
209. For the British position, see n207 supra. The workings of collective responsibility in South Africa will become apparent in the text infra.
210. Booysen and Van Wyk op cit 119.
211. Prime Minister Botha House of Assembly Debates 78 (1978) 7th December Col 8. The 'Information Scandal' was investigated in two official reports. See the Report of the Commission of Inquiry in Alleged Irregularities in the former Department of Information RP 113/1978; and the Supplementary Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information RP 63/1979.
212. Debates 78 (1978) op cit col 24.
213. Ibid.
214. C W Eglin the leader of the Progressive Federal Party, Debates 78 (1978) op cit cols 66-67; and W V Raw, the leader of the New Republic Party, Debates 78 (1978) op cit cols 87; & 95-96. V W Raw said at col 87:

    'I totally reject the Hon. the Prime Minister's claim that lack of knowledge and ignorance of what has happened absolves him or his Government from collective responsibility. It shows, moreover, that the Government failed to carry out its duty when it failed to establish the facts. It is therefore not a mitigating factor, but an aggravating factor in their responsibility and their culpability for what went on. It is an aggravating factor that they failed to obtain the information - knowledge - which it was the duty of the Cabinet, and particularly that of the Cabinet subcommitttee of three, to obtain.'

215. N214 supra.
216. Debates 78 (1978) op cit cols 533-534.
217. VerLoren Van Themaat 3ed op cit 183.
218. Booysen and Van Wyk op cit 119.
219. Ch 1 op cit 10-11; and Ch 7 op cit 202-204 supra.
220. MacIntosh The British Cabinet 529; & 533. In 1935 the British Cabinet ultimately decided to abandon its Foreign Secretary because of the unpopularity of the Hoare-Laval Pact which he had helped to negotiate. At first the Prime Minister and his colleagues had tried to protect Sir Samuel Hoare by sheltering him behind the cloak of collective responsibility. The pact, however, was being heavily criticized in Parliament. Collective responsibility was therefore withdrawn when it became obvious that continued Cabinet support for the actions of the Minister might lead

to parliamentary defeat for the entire government. The abandoned Foreign Secretary accepted individual responsibility for the unpopular pact and resigned from office. See further, Jennings Cabinet Government 476-478.

221. MacIntosh op cit 529-531; & 533.
222. N220 supra.
223. A Minister may voluntarily choose to resign, because he might feel in some way morally culpable for a decision which has had unfortunate consequences. The resignation may be related to a personal decision which he took while holding ministerial office, or it may be related to an error or blunder committed by an official in his department. MacIntosh op cit 529-530. A clear example of such a resignation in recent years was that of Lord Carrington as British Foreign Secretary during the Falkland Island crisis of 1982. Wade and Bradley's Constitutional and Administrative Law op cit 116-117.
224. N220 supra.
225. Ibid. The ultimate fate of Sir Samuel Hoare may be contrasted with full Cabinet support for the British Colonial Secretary in 1958. MacIntosh op cit 530-531.
226. Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information RP 113/1978 74-75.
227. The Ministers were criticized by the leader of the Opposition, C W Eglin. Debates 78 (1978) op cit cols 41-42; 54; & 59-65. They were both equally condemned by the leader of the New Republic Party, W V Raw. Debates 78 (1978) op cit cols 93-95.
228. Ch 7 op cit 216-217 & n210 supra.
229. Geldenhuys and Kotzé 'Man of Action' (1985) 4 (No 2) Leadership 33; and Giliomee Afrikaner Power op cit 202-205.
230. Debates 78 (1978) op cit cols 505-506 (underlining added). See also op cit cols 508-509; & 516.
231. Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information RP 113/1978 paragraph 10.339. (Underlining added).
232. There are certain parallels with the 'Profumo Scandal'of 1963. Wade and Phillips op cit 106-107. There is evidence to suggest, however, that the British Cabinet has deliberately chosen to withhold information from Parliament without any adverse political reaction. See 'Old Bailey Clears Ponting' Cape Times 12th February 1985; or 'Jury acquits Ponting of secrets Act breach' The Times 12th February 1985. For an analysis of the 'Ponting Affair', see Drewry, 'The Ponting Case - Leaking in the Public Interest' (1985) Public Law 203-212.
233. Dr C Mulder was attacked by the Erasmus Commission for the manner in which he had discharged his ministerial obligations as head of the Department of Information. Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information RP 113/1978 76-85. B J Vorster, who had been Prime Minister of South Africa while the irregularities were taking place, and who was State President at the time of the Erasmus

Reports was condemned in the second, supplementary report. Supplementary Report of the Commission of Inquiry into Alleged Irregularities in the former Department of Information (RP 63/1979) Ch 3. See especially op cit 6-11. Both men thereafter retired from public office. Booysen and Van Wyk op cit 119. Dr Mulder resigned from the Cabinet on 8th November 1978 - one month before the Information Scandal debate in Parliament. Parliamentary Register 1910-1982 76. B J Vorster resigned as State President on 3rd June 1979, shortly after the completion of the Erasmus Commission's Supplementary Report. Parliamentary Register 1910-1982 8.

234. C W Eglin, leader of the Progressive Federal Party, Debates 78 (1978) op cit Cols 54-55; and W V Raw, leader of the New Republic Party Debates 78 (1978) op cit col 87.
235. N220 supra.
236. House of Assembly Debates 72 (1978) 31st January cols 116 & 118. Mrs H Suzman argued that S Biko died on 7th September 1977. Op cit col 116-117.
237. Mrs H Suzman Debates 72 (1978) op cit cols 117-118.
238. Mrs H Suzman Debates 72 (1978) op cit cols 118-121; C W Eglin op cit cols 26-27; and W M Sutton op cit col 141.
239. W M Sutton Debates 72 (1978) op cit 141:

> 'I believe that if there is a case to be made out for the Hon. the Minister to resign, it is on the basis of the remarks that he made, not on the basis of the action he took...'

See also Mrs H Suzman op cit col 121.

240. The Minister of Justice, Police and Prisons finally resigned on 19th June 1979. Parliamentary Register 1910-1982 77.
241. Dean A New Constitution? op cit 475; and Ch 1 op cit 10 & n53 supra.
242. Dean A New Constitution? op cit 475.
243. The term 'White person' is defined in the Population Registration Act No 30 of 1950 s 1. S 1, as currently amended reads:

> 1 (1) ' "White person" means a person who-
> (a) in appearance obviously is a white person and who is not generally accepted as a coloured person; or
> (b) is generally accepted as a white person and is not in appearance obviously not a white person, but does not include any person who for the purposes of his classification under this Act, freely and voluntarily admits that he is by descent a Black or a coloured person unless it is proved that the admission is not based on fact.'

S 1(1) also defines a 'coloured person' as follows:

> ' "Coloured person" means a person who is not a white person or a Black person'

A 'Black person' is defined in s 1(1) as follows:

> ' "Black" means a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.'

Note, the parliamentary franchise in South Africa was ultimately restricted exclusively to Whites. Dean A New Constitution? op cit 461 & n7.

244. For the non-Westminster tradition of South Africa's constitutional heritage, see Boulle op cit 152-199.